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6. *Administration—Purchase by executor of debts against the estate—To whom the benefits belong.*—An executor has no claims against an estate for the face of claims which he purchases at a discount. He may so purchase, but not for himself; and all his transactions in that regard should be treated as for the estate, whose agent and servant he is.—*Id.*

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2. *Agency—Skill and discretion—Agency not delegated.*—It is a settled principle in the law of agency that where an authority is conferred requiring skill or discretion on the part of an agent, and no power of substitution is given, then the agent must act in person, and the principal would not be bound by any act of a sub-agent. But this doctrine has no application to the responsibility of an accident insurance company for acts of its sub-agents.—Brown v. R. W. Passenger Assurance Co., 221.

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2. *Equity — Attachment — Innocent purchaser for value, etc.— Cloud on title, bill in equity for removal of.*—Under an attachment issued from one county, certain land was seized in another; but there was no record evidence in the latter county either of its issue or of any proceedings under it. Prior to the levy it had been conveyed away by defendant, and passed through two or three hands. Subsequent to the attachment it was purchased by a third party, who, after payment of the purchase money, and at the delivery of the deed, for the first time got notice of the attachment. Judgment being had on the attachment, the land was sold under execution, and bought in by plaintiff, the attaching creditor. Plaintiff in the attachment afterward brought his bill in equity against the purchaser to remove the cloud on the title acquired by his purchase under the execution. *Held,* that the bill contained no equity, and should be dismissed.—Hamilton v. McClelland, 424.
3. *Attachment—Garnishment—Production of note—Construction of statute.*— Section 26 of the statute touching garnishment (Wagn. Stat. 668) does not contemplate an original proceeding to compel defendant to file in court a promissory note theretofore executed by plaintiff to defendant, although proceedings in attachment had been commenced by a third party against defendant, wherein plaintiff had been summoned as garnishee. The statute only aims to give the garnishee in a pending action an opportunity to protect himself by compelling the attachment debtor to produce the note in controversy, or show a sale or transfer if one had been made.—Murphy v. Wilson, 427.

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BANKS AND BANKING.

1. *The State Bank act not in conflict with section 6, article 9, of the State constitution.*— Section 6 of the act touching the State Bank (Sess. Acts 1865, p. 16) is not in conflict with section 6, article 9, of the State constitution. That the act provided that the purchase money arising from the sale of the stock held for school purposes by the State might be paid in the bonds and coupons of the State, does not necessarily make it an investment in either State bonds or obligations. The State had the undoubted right to sell, and it was responsible to the school and seminary fund for the price which it received growing out of the sale; but if it took in payment its own indebtedness, and replaced the amount in money from the treasury, there would be nothing objectionable in the transaction. — State v. Bank of the State of Missouri, 528.

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2. *Act of March 5, 1866, touching State Bank, relates to but one subject.*—The act touching the State Bank is not in conflict with section 32, article 4, of the State constitution. The reorganization of the bank, the selling of the stock, and the investment of funds were all matters intimately connected and blended, and had a natural coherence and congruity, and might be well combined in the same bill.—*Id.*

3. *Act touching State Bank—Sale of stock by agent appointed by the State—Authority must be strictly followed—Caveat emptor—Ratification by governor—Fact that State loses nothing, no argument for sale.*—The intention of section 5 of the act of March, 1866, touching the State Bank, was to advise the public that, up to a certain time, proposals might be made for the purchase of the stock held by the State, and that all should come in open, free, and fair competition, and to guard against unfairness and preclude the possibility of connivance and fraud. And a sale by the agent of the State, after the time advertised and without notice, amounted simply to a private sale in total disregard of the law. In such a state of facts, *held*, as follows:

1. The sale was not within the authority committed to the agent, and was not binding on the State.

2. The agency being conferred by statute and growing out of it, must be ascertained from the statute, and can not be varied or enlarged.

3. When the agent is specially appointed by the State for the sale, the purchaser is presumed to know his authority; and if he purchases in a case where that special authority is not pursued, he purchases at his peril.

4. The ratification of the sale by the governor, without the action of the Legislature, would not validate the contract. The governor himself was merely an agent, and incapable of confirming the act.

5. The fact that the purchaser was the highest bidder does not affect the case. *Non constat* but the offer, notwithstanding, was insufficient; and in that case the proposal should have been rejected and the property again advertised according to law. To sanction the doctrine that one may make a contract with a public agent in known violation of law, and then hold its benefits on the ground that the State has suffered no loss, is of modern invention, and fatal to public interests.—*Id.*

4. On motion to stay execution on judgment against the bank for the amount of dividends due on the stock, *held*, 1st, that said motion could not be granted on the mere suggestion of other stockholders; 2d, that the fact that third persons purchased the stock, believing that the purchaser had good title, would not avail them. He could only purchase such title as he himself possessed, and his title was acquired under a law which every person was bound to know and construe at his peril.—*Id.*

BILLS AND NOTES.

1. *Evidence—Certificate of deposit—Manual delivery, effect of.*—A. deposited a certain fund in bank, and, as evidence of his title, took a certificate of deposit payable to his own order. His title thus acquired must be presumed to continue until a divestment of it is shown, and a mere manual delivery of the certificate to B., without indorsement, and unaccompanied with evidence of a consideration paid, would not pass the title as against A.—Vastine, Public Administrator, v. Wilding, 89.

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2. *Promissory note — Indorsement — Proof of demand — Character of indorsement, question for jury. — Prima facie,* a party who writes his name on the back of a promissory note, of which he is neither payee nor indorsee, is to be treated as the maker of the note, and the payee is entitled to recover of him, without proof of demand on the maker and notice of non-payment. The question in what character he put his name on the back of the note was, in case of suit against him on the note, one of fact, exclusively for the jury. —Western Boatmen's Benevolent Association v. Wolff, 104.
3. *Contract — Bill of lading, negotiability of.*—In a qualified and restricted sense, a bill of lading has the attribute of negotiability, and may be transferred by indorsement and delivery.—Davenport National Bank v. Homeyer, 145.
4. *Contract — Bill of lading — Delivery without indorsement.*—The delivery of a bill of lading without indorsement, for value, transfers the property in the goods which it covers.—*Id.*
5. *Contract—Bill of lading attached to draft—Delivery without indorsement.* A. consigned to B., as his factor, 300 barrels of flour, and drew on him for the amount due. The draft was discounted by a bank on the faith of the bill of lading issued on the flour. The bill was attached to the draft as collateral security, and thus transferred to the bank, but was not indorsed or formally assigned, B. having refused to accept the draft. *Held,* that he was not at liberty to appropriate the flour or its proceeds to his own use. It was the property of the bank, for the purpose of meeting the dishonored draft.—*Id.*
6. *Bills of exchange and promissory notes — Accommodation parties — Liability.*—In commercial law, in the absence of a contract, the accommodation indorsers of a promissory note are not co-sureties, but are held in the order of their indorsements. As to the liabilities of parties to bills of exchange, there is but one rule known to the law. The drawer of the bill, if accepted, is bound to all other parties. Upon his default the drawer becomes obligated to the indorser, and the indorsers, if there are more than one, are bound in the order of their indorsements, and the accommodation parties to the bill should not be held to those for whose benefit it is drawn. But all the accommodation parties, as between themselves, are bound by the obligations which they assumed under the law merchant by becoming such parties. —McCune v. Belt, 174.
7. *Bills and notes — Parties — Co-sureties.*—Parties to bills and notes who intend to become co-sureties, should so agree, or should all be drawers merely; the payee and indorser should also be drawers.—*Id.*
8. *Bills and notes — Co-sureties — Equity — Indemnity of one inures to the benefit of all.*—It is a settled principle of equity that if one of several co-sureties subsequently takes a security from the principal for his own indemnity, it inures to the benefit of all the sureties, so far as they are co-sureties. But so far as he has a security for individual claims which he has against the same person, he is entitled to hold it.—*Id.*
9. *Debtor and creditor—Payments where several debts are due between the same parties, how applied.*—Under ordinary circumstances, when payments are made upon several debts due the same person, or upon a running account, the debtor making them may say upon which debt or item of account they shall apply, or, if he makes no election, the creditor may make the applica-

BILLS AND NOTES—(*Continued.*)

tion; and if neither of them decides the matter, then it must apply upon the oldest or one first maturing. And if the creditor once makes the application he shall not be permitted to change it, if afterwards circumstances make it for his interest to do so. But the rules are controlled by the equities of the case.—*Id.*

10. *Bills and notes — Part payment —Promise to pay remainder —Accord and satisfaction.*— Part payment of a note, coupled with a promise to pay the remainder on request, where the note itself was neither paid, canceled or surrendered, and no agreement was entered into on the one side either to surrender or release it, and no offer was made on the other to pay the balance due, amounted merely to an executory accord, and constituted no bar to suit on the note for the balance; nor would the fact that the transaction was in writing vary the result.—Peterson v. Wheeler, 369.

11. *Bills and notes — Contribution —Suit for, by co-surety—Statute of limitations.*— In case of suit for contribution by a surety on a bill of exchange against his co-surety, the statute of limitations commences running against his claim from and after the day on which he paid the original judgment on the bill, and not from the time when the bill was dated; and his claim is not operated on by the limitation of ten years, but by that of five.—Singleton v. Townsend, 379.

12. *Bills and notes, action on — Averments as to title — Pre-existing indebtedness — Manner of acquiring ownership — Allegation as to, immaterial.* — In a suit on a promissory note, the petition alleged that the payer transferred the note to plaintiff "for a valuable consideration to the payee in hand paid." *Held*, that proof showing the note to have been sold plaintiff in satisfaction of a pre-existing debt, sufficiently sustained the averment of the petition in regard to title. Under such averment the only material fact to be established was that of ownership; and the manner of acquiring it, whether by purchase with cash or other property, or by a discharge of pre-existing indebtedness, is of no importance.—Wilson v. Murphy, 409.

13. *Bills and notes, suits on — Pendency of attachment suit wherein defendant was garnishee, no defense, when.*— In a suit on a note by the assignee of the payee against the makers, the pendency of an attachment suit against the payee, wherein the makers were sued as garnishees, would constitute no defense if the assignment was in fact made before the garnishment. The pendency of the attachment might be pleaded in bar, provided the defense alleged that the note sued on was, *e. g.*, in fact still the property of the attachment debtor, and not simply charged by the creditor as his property. The garnishee may protect himself from liability to double payment by conforming to the requirements of the statute. (Wagn. Stat. 668, §§ 25–6.) —*Id.*

14. *Bills and notes—Payment of one note by another—Satisfaction and accord —Possession.*—A. was owner of a note made by B., deceased. The wife of A. was one of the heirs of B. The remaining heirs executed to A. their joint note for the amount named in that of B., less the proportion due from the wife of A. In a suit against the surety of B. on the note, *held*, that a receipt by A. of the note given by the heirs, unconditionally, and in full payment of the note of B., and a delivery of the latter to a surety of B. as paid, was a payment and satisfaction of the same; and that possession of the

BILLS AND NOTES—(*Continued.*)

note by the surety after maturity was *prima facie* evidence of its payment.—Lawson v. Gudgel, 480.

15. *Bills and notes secured by deed of trust—Priority of payment, although all become due on default of payment on one note.*—Although by the express terms of a deed of trust the notes secured all became due upon the first default in payment, it did not follow that they stood on an equality in the distribution of the fund. Without an express agreement to that effect, the priority of claims in such case will not be impaired or interfered with. (Mitchell v. Ladew, 36 Mo. 526; Mason v. Barnard, *id.* 384, affirmed.)—Hurck v. Erskine, 484.

16. *Notes and bills—Probata and allegata—Verdict, amendments after.*—A., B., and C. were sued as the makers of a promissory note. The proof showed that a firm, of which A. and B. were two of the members, by its copartnership name, together with C., actually made the note. *Held*, that the defect in the description did not amount to a misdescription. The case was not one where the allegations were unproved in their entire scope and meaning, in the sense of the statute (Gen. Stat. 1865, p. 683; Wagn. Stat. 1058, § 1); and an amendment of the defect after judgment, in accordance with the statute Wagn. Stat. 1034, §§ 5, 6), furnished a perfect protection against a second suit on the same note.—Schmidt v. Kellner, 502.

17. *Bills and notes—Signature of maker on back of note—Co-surety, etc.*—It is of no consequence that the signature of the maker is placed on the back of the note, so that he signs it as a maker; nor does it make any difference that, as between himself and his co-makers, he is a surety.—*Id.*

18. *Bills and notes—Protest, notice of—Forwarding—Proof as to res gestæ.*—In a suit against the indorsers on a promissory note, when a controversy arose as to the time and manner of forwarding the notices of protest, the declarations of one who delivered them to defendants, made at the time of delivery, were sought to be introduced in evidence, although it did not appear how he came by them, or that the notary delivered them to him, or had ever seen or heard of him. *Held*, that such declarations were not to be regarded as *res gestæ* in connection with the forwarding of the notices, and were inadmissible.—Merchants' Bank v. Berthold, 527.

See ATTACHMENTS, 3.

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BOATS AND VESSELS.

1. *District Courts, jurisdiction of—Admiralty—Maritime liens.*—Maritime contracts, in the sense used in admiralty practice, and marine torts, in cases where a maritime lien arises, belong to the exclusive and original jurisdiction of the District Courts of the United States; and therefore those provisions in the statutes of this State which authorize actions *in rem* against vessels by name in such cases, are not sustainable.—Mitchell v. Steamboat Magnolia, 67.

2. *Admiralty—Steamboats, equipment of, at home port—Jurisdiction of State courts.*—The furnishing of the material for the equipment and outfit of a steamboat, at her home port, is not a regulation of commerce, nor a maritime contract, but such a contract as it is competent for the States to act upon, and

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to create such liens in relation to, as their Legislatures may deem just and expedient.—*Id.*

3. Mitchell v. Steamboat Magnolia, *ante*, p. 67, affirmed.—Persch v. Steamboat Magnolia, 69.

4. *Contracts—Boats and vessels—Charter-party—Ownership for the voyage—Owner's lien.*—The owner of a vessel who is also the carrier has a lien upon goods for their transportation, but it does not follow that he who has the title to the property employed in the transportation is necessarily the owner for the voyage. The proprietors of a steamboat or ship, as well as of other property, may lease the same, give up all possession and control, reserving only rent; and in that case the lessee, although the lease assume the form of a charter-party, becomes the owner for the term. The charter-party, instead of a contract of assignment, becomes but a demise; and the temporary owner may carry for others, and they are responsible only to him.—Adams v. Homeyer, 545.

5. *Contracts—Boats and vessels—Charter-party, construction of—Possession of vessel.*—The general owner may let his ship with a master and crew of his own choosing, and if there is evidence of intention to part with the possession, it is held to be a demise. But a covenant that he shall have the right to appoint the master to control and navigate, clearly indicates an intention not to trust the property in the hands of others, but to control it by his own agents for the use of the charterers; and he is to be considered as retaining possession. —*Id.*

6. *Contracts—Boats and vessels—Charter-party, terms of, presumed to be known to parties having dealings with the vessel.—Semble,* that persons contracting with the charterer of a vessel must be presumed to know the terms of the charter-party.—*Id.*

7. *Boats and vessels—Charter-party—Right of master to freights—Implied contract against consignees who receive goods transported.*—Whatever stipulations may have been made between the consignees of a cargo and the charterer of a vessel which transports them, for the appropriation of the return freights, the right of the master to collect them from the consignees after delivery to them of the goods, at least to the amount due on the charter-party, can not be questioned. The delivering of the goods to the consignees, and their acceptance of them under the bill of lading, raises an assumpsit against them to pay freights according to the stipulations of the bill of lading. And this implied obligation becomes a positive one when the goods are received with notice that the freights must be paid to the master, and not to the charterer.—*Id.*

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1. *Bonds—Act of March, 1867, authorizing forfeiture of credit, not penal.*—The provision of the act of March 10, 1867 (Sess. Acts 1867, p. 18, § 3),

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authorizing the forfeiture of the credit on non-payment of interest on bonds, is not such a penalty as to bring the bonds within the statute pertaining to penal bonds. (Gen. Stat. 1865, ch. 150.)—Moore v. City of Jefferson, 202.

2. *Bonds—Jefferson City—Receipts of interest after suit commenced not a waiver of right to recover face of bond.*—After commencement of suit on Jefferson City bonds (Sess. Acts 1867, p. 18, § 3) for non-payment of interest due thereon, the mere receipt by plaintiff of said interest, without proof of any agreement to discontinue suit or waive the forfeiture, is not a waiver of his right under that statute to recover the whole amount of the bond.—*Id.*

3. *Bonds, forfeiture of—Agreement to waive, effect of.*—*Semble,* that a contract to waive the forfeiture of a bond, although without consideration, should be held to have the same force as an act which of itself indicated a waiver, when that contract is an inducement to the performance of the conditions the neglect of which has caused the forfeiture.—*Id.*

## C

CAPE GIRARDEAU COURT OF COMMON PLEAS.

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1. *Carriers, associations of—Joint liability for losses at any point in transit.*—Where carriers on connecting routes form associations and arrangements for the purpose of carrying goods or parcels through the whole line, they are, beyond question, partners, and each is responsible for any loss or injury to goods which may happen, in whatever part of the line it occurs.—Coates v. U. S. Express Co., 238.

2. *Carriers—Express companies—Goods lost in transit beyond their line of transport, who responsible for.*—In a suit against an express company for goods lost in transit beyond its line of conveyance, where the evidence showed no payment for the whole route, and no understanding, usage, or agreement that the company assumed to be responsible for the goods after they left its own line: *held,* that it was only bound, under its contract or undertaking, to transport them safely to the point on its line nearest the place of destination, and then to deliver them to the proper carrier to be forwarded; and that, having done this, it was not responsible for a subsequent loss.—*Id.*

See BOATS AND VESSELS.

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CIRCUIT ATTORNEYS.

1. *Circuit attorneys—Fees.*—In cases where indictments were found and drawn up during the term of one incumbent of the office of circuit attorney, and he performed all the actual services which were rendered, and the cases were continued and not brought to trial, and no services rendered in them by the next incumbent of that office during his term, the fees accrued belonged to the former.—Vastine v. Voullaire, 504.

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CONSTITUTION.
1. *Act as to organizing schools not unconstitutional because to be submitted to popular vote.*—The Legislature can not propose a law and submit it to the people to pass or reject it by a general vote. But chapter 47 of Gen. Stat. 1865, authorizing cities, etc., to organize for school purposes, became valid on its passage; and if the people, by vote, elected not to avail themselves of its privileges, their action did not in the least impair its force. It can not be held unconstitutional merely because it depends for its efficacy on the vote of the people.—State ex rel. Dome v. Wilcox, 458.
2. *Act as to organizing schools, etc., not unconstitutional, as being special in its nature.*—Chapter 47, Gen. Stat. 1865, is not obnoxious to section 27, article 4, or section 4, article 8, of the constitution, as being special in its nature. Special statutes therein referred to are such as relate to individual classes or particular localities. Had the act applied to a certain specified town or a single corporation, it would have been in conflict with those sections. That law is as general as is consistent with its scope and design, and no law more general could be framed to effectuate the object in view.—*Id.*
3. *Act as to organizing schools—Loaning credit by town, for purpose of, constitutional.*—Section 14, article 11, of the State constitution has exclusive reference to municipal corporations becoming stockholders and loaning their credit to private companies, associations, and corporations, and can not be applied to a case where (as under chapter 47, Gen. Stat. 1865) a town loans its credit for public school purposes.—*Id.*
4. *Constitution, section 32, article 4, mandatory.*—Section 32, article 4, of the constitution, which declares that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title," is equally obligatory and mandatory with any other provision thereof; and where a law is clearly and palpably in opposition to it, there is no other alternative but to pronounce it invalid.—State v. Miller, 495.
5. *Act to prevent issue of false receipts, etc., constitutionality of.—Section 32, article 4, of constitution.*—The act entitled "An act to prevent the issue of false receipts or bills of lading, and to punish fraudulent transfers of property by warehousemen, wharfingers, and others," is sufficiently in conformity with section 32, article 4, of the State constitution. The act shows clearly that its object was to strike at a whole class of cases, and remedy an existing evil; and while warehousemen and wharfingers are enumerated in the title, "others" are spoken of, and the provisions of the act treat of subjects which have a natural connection.—*Id.*

See BANKS AND BANKING, 1, 2. COURTS, COUNTY, 3. OFFICERS, 7.

CONTRACTS.
1. *Equity—Lands, sale of—Specific performance, discretion of court in enforcing.*—Whether a decree for specific performance shall be awarded in any particular case, is always a matter resting in the sound and reasonable discretion of the court, and it is held to be a reasonable exercise of this power to deny a decree when its allowance would be harsh or oppressive in its operation on either party.—Taylor v. Williams, 80.
2. *Contracts, specific enforcement of—Must be precise, etc.*—Contracts sought

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to be specifically enforced must not only be proved in a general way, but their terms must be so precise and exact that neither party could reasonably misunderstand them, and those terms must be satisfactorily established by the evidence.—*Id.*

3. *Contract — Assignment — Inducement — Trust and confidence.*—Where a contract may have been founded in personal trust and confidence, the assignee thereof can not recover upon it without the consent of the party contracting with his assignor, to the assignment.—Lansden v. McCarthy, 106.

4. *Sale — Real estate — Deed of trust—Re-sale.*—At a sale of real estate under a deed of trust, when the highest bidder fails to pay the purchase money, the property may be re-sold by the trustee. (44 Mo. 145; 38 Mo. 469.)—O'Fallon v. Kennerly, 124.

5. *Equity—Sale—Specific performance, when granted—Executory contract.*—Equity may decree a specific performance of a contract for the sale of property, notwithstanding a default in payment upon the day specified, and in many cases where there is an express stipulation of forfeiture. But this relief has always been afforded upon equitable principles, and some circumstances must exist to show that the party is justly entitled to it. There is no respectable case, where the contract is wholly executory and the time specific when the purchase money shall be paid, with an express condition of forfeiture if not paid at that time, and where the purchaser has never taken possession or expended anything on the premises, but waits for several years after the payments are due, and until there is a rise in value, in which the purchaser can obtain relief.—*Id.*

6. *Bonds—Conveyance of real estate—Payment—Forfeiture—Waiver.*—Where a bond is given to convey real estate, conditioned on the payment of certain money at a specified time, even though it contains an express stipulation of forfeiture in case of non-payment, yet if part payment be made and accepted after the time fixed, the forfeiture is waived; and upon tender of the balance, the purchaser has a clear equity, but without such tender he has no equity.—*Id.*

7. *Contract—Bill of lading, negotiability of.*—In a qualified and restricted sense, a bill of lading has the attribute of negotiability, and may be transferred by indorsement and delivery.—Davenport National Bank v. Homeyer, 145.

8. *Contract — Bill of lading — Delivery without indorsement.*—The delivery of a bill of lading without indorsement, for value, transfers the property in the goods which it covers.—*Id.*

9. *Contract—Bill of lading attached to draft—Delivery without indorsement.*—A. consigned to B., as his factor, 300 barrels of flour, and drew on him for the amount due. The draft was discounted by a bank on the faith of the bill of lading issued on the flour. The bill was attached to the draft as collateral security, and thus transferred to the bank, but was not indorsed or formally assigned, B. having refused to accept the draft. *Held*, that he was not at liberty to appropriate the flour or its proceeds to his own use. It was the property of the bank, for the purpose of meeting the dishonored draft.—*Id.*

10. *Land, sale of—Part performance—Escrow—Delivery of deed.*—A. made a verbal contract with B. for the purchase of certain land. Part of the purchase money was paid at the time. The remainder was to be paid in two weeks, when a warrantee deed for the property was to be given. The deed in the

CONTRACTS—(*Continued.*)

meantime was deposited with a third party as an escrow. At the time named for completing the contract, A. refused to pay the remainder, and having purchased of C., who held adversely to B., went into possession under him. *Held*, that the facts showed no such part performance as to take the case out of the statute of frauds. Such a deposit of the deed could not be made to operate as a delivery. At law, the statute would be a complete bar to an action to recover the money due, even if the contract were so performed as to make it a fraud to seek to evade it.—Townsend v. Hawkins, 286.

11. *Conveyances — Title bond — Purchase, possession taken after — Refusal of deed — Suit for recovery of purchase money.* — When one pays the money and takes possession under a title bond for the conveyance of land, and the vendor, after neglecting for three years to execute the deed, makes tender thereof, the vendee can not reject the deed and sue for the recovery of the purchase money. Time not being of the essence of the contract, and the vendee being in possession, the delay was not such as to furnish ground for rescission of the contract.—Woodward v. Van Hoy, 300.

12. *Statute of frauds — Contracts not to be performed in one year, executed by one party, statute can not be invoked by the other.* — The purchaser of a carding machine, by a verbal agreement with the vendor, bound himself not to use any other carding machine in the vicinity of the one sold, for a period of four years. In suit by the vendor for breach of the contract, *held*, that although the contract could not be wholly performed within one year, yet, having been completely executed by the plaintiff, defendant could not interpose the statute of frauds.—Self v. Cordell, 345.

13. *Equity — Bill to rescind contract of sale of land — New consideration — Actual abandonment.*—A verbal agreement to rescind a contract under seal for the sale of land, made after payments are due, and founded upon no new consideration, unless followed by an actual abandonment of the sale by both parties and a restoration of the property so far as possible to the vendor, will be treated as invalid in a suit by the vendor for the stipulated purchase money. —Pratt v. Morrow, 404.

See Boats and Vessels, 4, 5, 6, 7. Bonds, Municipal, 1. Husband and Wife, 6. Insurance, 8. Landlord and Tenant, 1. Sales, 1, 2.

CONVEYANCES.

1. *Lands and land titles — Confirmation — Assignment — Act of July 4, 1836.* —The board of commissioners, under the act of Congress of July 4, 1836, confirmed a certain lot "to A. or his legal representatives." *Held*, that the party claiming must do so, if not in his own name, at least in his own person, and produce evidence of his title as such legal representative. This being done, the title will inure to his own benefit; and it is not necessary that the confirmation should be made to him by name. (Connoyer et al. v. Washington University, 36 Mo. 481.)—Connoyer v. LaBeaume's Heirs, 139.

2. *Equity — Devises of lands; of money in lieu of — Election — Conveyance of land pending election — What title conveyed.* — When the testator devises the interest of certain heirs in a specified tract of land to other members of his family, and also devises to said heirs certain moneys as their full share and just proportion of the land, the equity doctrine of election applies; the appearance of the heirs in court and their renunciation of the land is also

CONVEYANCES—(*Continued.*)
an election; and the attempted conveyance by them and its acceptance by the purchaser during suit in partition of the land, and while the election is being made, especially when the purchaser acted as a sort of attorney for them, and drew and swore them to their answer in that suit, is a gross and naked fraud attempted to be perpetrated upon the other heirs of the testator, a contempt of the court in which the proceedings are pending, and possesses no validity whatever.— O'Reilly v. Nicholson, 160.

3. *Lis pendens—Deed void.*—The deed of a party *pendente lite* is void, and even an innocent purchaser would take nothing by his deed, and could convey nothing; and a purchaser *pendente lite* is bound by the decree that may be made against the person from whom he derives title.—*Id.*

4. *Terms "fee," "fee simple," "fee simple absolute," meaning of.*—In modern estates the several terms "fee," "fee simple," and "fee simple absolute," are substantially synonymous.—Jecko, Trustee of Hume, v. Taussig, 167.

5. *Conveyances — Fee simple — To married woman — Authority of to convey, with remainder, over to heirs, etc.*— Certain land was conveyed to a married woman and her trustee, "to be sold and conveyed in fee, mortgaged, or rented," as she might, in writing, direct. The deed further provided that, in case of her death before her husband's, the estate might vest in her surviving children. *Held,* that her authority to convey was absolute and unlimited, and that the latter provision did not affect her power of alienation during the life of her husband: *semble,* that equity will enforce specific performance of a contract to purchase an estate so conveyed upon tender of deed to the purchaser. —*Id.*

6. *Deeds — Delivery of with intent to invest title, effect of.*— A deed delivered by the grantor, with the intent and purpose of vesting the title in the grantee, amounts to a substantial transfer of the estate, and no subsequent act can defeat it.—Parsons v. Parsons, 263.

7. *Land, sale of—Part performance—Escrow—Delivery of deed.*—A. made a verbal contract with B. for the purchase of certain land. Part of the purchase money was paid at the time. The remainder was to be paid in two weeks, when a warrantee deed for the property was to be given. The deed, in the meantime, was deposited with a third party as an escrow. At the time named for completing the contract, A. refused to pay the remainder, and having purchased of C., who held adversely to B., went into possession under him. *Held,* that the facts showed no such part performance as to take the case out of the statute of frauds. Such a deposit of the deed could not be made to operate as a delivery. At law, the statute would be a complete bar to an action to recover the money due, even if the contract were so performed as to make it a fraud to seek to evade it.—Townsend v. Hawkins, 286.

8. *Conveyances — Title bond — Purchase, possession taken after — Refusal of deed—Suit for recovery of purchase money.*—When one pays the money and takes possession under a title bond for the conveyance of land, and the vendor, after neglecting for three years to execute the deed, makes tender thereof, the vendee can not reject the deed and sue for the recovery of the purchase money. Time not being of the essence of the contract, and the vendee being in possession, the delay was not such as to furnish ground for rescission of the contract.—Woodward v. Van Hoy, 300.

9. *Deeds — Misdescription — Meaning of word "on."*— A deed described cer-

CONVEYANCES—(*Continued.*)

tain land as lying "on the Louisville and Nashville railroad," without giving the description of it by boundaries. In suit to set aside the conveyance as bad for misdescription, the proof showed that the land was near to, but not bordering upon, the road. *Held*, that the word "on," as denoting contiguity or neighborhood, may mean as well "near to," as "at;" and in this sense the land was not misdescribed.—Burnam v. Banks, 349.

10. *Equity — Sheriff's sale — Misdescription — Purchase — Action for recovery of purchase money — Caveat emptor.*—A. owned certain described land in the north-*west* quarter of section *thirty*-five, township sixty, range thirty-six. Under execution against him, the sheriff, by mistake, sold and deeded to B. a tract similarly described in the north-*east* quarter of section *twenty*-five of the same township and range, to which A. had no title. The purchase money was paid, and went to extinguish the judgment against A. Supposing the land to be his, A. surrendered it to B., who moved on it and made improvements. Afterwards, discovering the misdescription, A. regained possession, claimed the land, and refused to refund the purchase money. *Held*, that the doctrine *caveat emptor* had no application to such a case; that the consideration for the money paid on execution had failed, B. having no title to the land, and that an action for the recovery of the money so paid was properly maintainable.—McLean v. Martin, 393.

11. *Sheriff, sale by — Mistake as to date of, in return and recitals of deed.*—Land was advertised by the sheriff to be sold, and was in fact sold, on the 5th day of January. But the sheriff's return, and his recitals in the deed to the purchaser, declared the sale to have been on the "4th" of January. *Held*, 1st, that the mistake in the return as to the day of sale was not material, for the reason that it was not necessary to the validity of the purchase that the sheriff should make a correct return, or any return at all; and 2d, that the mistake as to the exact day of sale, occurring in the deed, was also immaterial, provided that the deed on its face was according to law, showing a sale at an authorized day during term of court.—Buchanan v. Tracy, 437.

12. *Conveyances, voluntary — Nothing presumed in favor of without change of possession.*—Courts can not presume anything in favor of a gift of land, although upon family considerations, further than it is followed by actual and unequivocal possession and improvements.—Wiemer v. Stephani, 565.

See CONTRACTS, 1, 2, 6, 13. DAMAGES, 19. EVIDENCE, 6. LANDS AND LAND TITLES, 1, 2.

COPARCENER.

See HUSBAND AND WIFE, 2, 3.

CORPORATIONS.

1. *Facts preliminary to order of County Court — Corporations — Towns, establishment of.*—In alleging the existence of a town created under chapter 41, Gen. Stat. 1865, it is not necessary to set out the existence of the facts on which the order of the County Court establishing the corporate existence of the town was founded. The court had jurisdiction of the subject, and the propriety and regularity of its action is to be presumed until the contrary appears.—State ex rel. Read v. Weatherby, 17.

2. *Quo warranto — Towns and townships — County Court, order of — Fraud.*—In *quo warranto* proceedings against persons for usurping the franchise of

CORPORATIONS—(*Continued.*)

trustees of a town, under pretense that the inhabitants were a body corporate, under chapter 41, Gen. Stat. 1865, the only question to be determined is the legal existence or non-existence of the corporation. And where the order of the County Court establishing the town corporation is shown by the answer to be unobjectionable, a replication charging that the granting order was fraudulently procured by the applicants, is *dehors* the record and improper. —*Id.*

3. *Damages—Corporation liable for acts of agents, in what degree.*— Corporations, whether municipal or aggregate, are now held to the same liability as individuals; and if an agent or a servant of a corporation, in the line of his employment, shall be guilty of negligence or commit a wrong, the corporation is responsible in damages.—Hilsdorf v. City of St. Louis, 94.

4. *St. Louis, city of— Deposit of carcasses — Mayor.*— The city of St. Louis is not liable to the owner of property for damages caused by the deposit of dead mules on his premises, under an arrangement with the mayor. His action in such case was outside of his official duties, and could not bind the city.—*Id.*

5. *St. Louis, city of— Removal of carcasses — Power of city over acts of contractors.*— The city of St. Louis had no power to control the action of persons employed under article IX of ordinance 4894, for the removal of dead animals, under their contract; and having no such power, they could not be responsible for such action.—*Id.*

6. *St. Louis, city of— Removal of carcasses — Responsibility of owner for.*— The fact that the city of St. Louis has made a contract for the removal of dead animals does not exonerate the owner from any responsibility in regard to them, when that contract can not be or is not complied with; nor can the obligation he is under to let the contractor have the carcass if he does not himself appropriate it within twelve hours, if the contractor shall come for it, be construed to discharge all responsibility on his part.—*Id.*

7. *Insurance companies — Motion for judgment against stockholders — President, purchase of judgments by.*— In case of motion against the president of an insolvent insurance company, as stockholder therein, for the amount of an unsatisfied judgment against the company, he will not be allowed to offset the face of a judgment against the company, purchased by him while president, on speculation, but only the sum actually paid by him for the same. In such case the company's interests and his were identical. Public policy and morality alike forbid the chief managing officer of a company in such a manner to speculate for his private gain.—Lingle v. National Insurance Co., 109.

8. *Corporations — Railroads — Subscriptions to, vote upon — Definite amount of stock must be voted for.*— The law authorizing the Saline County Court to subscribe stock in the Lexington and St. Louis Railroad Company, expressly provided that the subscription should not be made unless a majority of the tax-payers should vote for it, "specifying the amount." The order of the County Court submitting the question to the people called on them to vote for or against an amount "not exceeding $70,000," leaving the precise amount undetermined. The entry in the records of the County Court, subsequent to the vote, declared that the election resulted "in favor of levying a tax of $70,000, to subscribe the same to the capital stock of the Lexington and St. Louis Railroad." In *mandamus* against the court to compel the issue of

CORPORATIONS—(*Continued.*)

the bonds, and levy of tax for their payment: *Held,* that such entry was not a conclusive finding of the court of the fact that the tax-payers voted to subscribe the specific sum of $70,000, but that, under a fair interpretation of the record, it showed merely that the question submitted had received a majority of the votes. The bonds of a county can be made valid only by a substantial compliance with the law that authorizes their issue; and the failure of voters to specify their amount, in the case at bar, rendered bonds issued in pursuance of such vote invalid.—State ex rel. Lexington and St. Louis R.R. Co. v. Saline County Court, 242.

9. *Corporations, attorneys at law may be employed by, without resolutions of the board of directors.*—Managing officers of corporations have power to employ attorneys and counselors without formal resolutions to that effect from their boards of directors.—Western Bank v. Gilstrap, 419.

10. *Corporation—Sale of stock in, under execution, gives purchaser what title.*—A sale of shares of stock of an incorporated company, under execution, will not vest the title thereto in the purchaser if the defendant in the execution had none; nor will he acquire any greater or other rights than the seller had.—Mechanics' Bank v. Merchants' Bank, 513.

11. *Corporation — Shares of stock — Transfer of indebtedness to bank.*— The by-law of a bank forbidding the transfer of stock where the owner was indebted to the bank, is valid, although inconsistent with the general law of the State governing the transfer of property; and in case of the sale under execution of shares of stock, the purchaser can not recover the shares, in an action of trover against the bank, till such indebtedness be satisfied.—*Id.*

See DAMAGES, 22, 23, 24, 25. INSURANCE, 1, 2. RAILROADS.

COSTS.

See PRACTICE, CRIMINAL, 2, 3.

COURTS, CAPE GIRARDEAU COMMON PLEAS.

See MANDAMUS, 1.

COURTS, CIRCUIT.

See COURTS, COUNTY, 8. COURTS, ST. LOUIS CIRCUIT. ROADS, COUNTY, 2.

COURTS, COUNTY.

1. *Facts preliminary to order of County Court — Corporations — Towns, establishment of.*—In alleging the existence of a town created under chapter 41, Gen. Stat. 1865, it is not necessary to set out the existence of the facts on which the order of the County Court establishing the corporate existence of the town was founded. The court had jurisdiction of the subject, and the propriety and regularity of its action is to be presumed until the contrary appears.—State ex rel. Read v. Weatherby, 17.

2. *Quo warranto—Towns and townships — County Court, order of—Fraud.*—In *quo warranto* proceedings against persons for usurping the franchise of trustees of a town, under pretense that the inhabitants were a body corporate, under chapter 41, Gen. Stat. 1865, the only question to be determined is the legal existence or non-existence of the corporation. And where the order of the County Court establishing the town corporation is shown by the answer to be unobjectionable, a replication charging that the granting order was fraudulently procured by the applicants, is *dehors* the record and improper.—*Id.*

COURTS, COUNTY—(*Continued.*)

3. *Towns — Chapter 41, Gen. Stat. 1865, constitutional.* — Chapter 41, Gen. Stat. 1865, concerning towns, etc., is constitutional. (Kayser v. Bremer, 16 Mo. 88.)—*Id.*

4. *Election — St. Louis County Court — Term of office of judge appointed to fill vacancy — Construction of statute.* — Under section 2 of the amendatory act concerning St. Louis county (Adj. Sess. Acts 1863–4, p. 279), the term of office of a judge appointed to fill a vacancy in the St. Louis County Court, continued only until the next general election, and not till the next regular election of county judge, as contemplated by the act of January 6, 1860 (Sess. Acts 1859–60, p. 524, § 12).—State ex rel. Attorney-General v. Conrades, 45.

5. *Courts, County, allowance of claim by—In what case not res adjudicata.*— The action of a County Court in allowing a claim of the county collector against the county, through a mistake of fact, is not *res adjudicata*, so as to bar a suit by the county to recover back the amount allowed. In such case the judges of the court acted merely as the fiscal agents of the county, and their mistake might be inquired into and corrected, as well as those of an individual acting in his own behalf.—County of Marion v. Phillips, 75.

6. *Corporations — Railroads — Subscriptions to, vote upon — Definite amount of stock must be voted for.*—The law authorizing the Saline County Court to subscribe stock in the Lexington and St. Louis Railroad Company, expressly provided that the subscription should not be made unless a majority of the tax-payers should vote for it, "specifying the amount." The order of the County Court submitting the question to the people, called on them to vote for or against an amount "not exceeding $70,000," leaving the precise amount undetermined. The entry in the records of the County Court, subsequent to the vote, declared that the election resulted "in favor of levying a tax of $70,000, to subscribe the same to the capital stock of the Lexington and St. Louis Railroad." In *mandamus* against the court to compel the issue of the bonds, and levy of tax for their payment: *Held*, that such entry was not a conclusive finding of the court of the fact that the tax-payers voted to subscribe the specific sum of $70,000, but that, under a fair interpretation of the record, it showed merely that the question submitted had received a majority of the votes. The bonds of a county can be made valid only by a substantial compliance with the law that authorizes their issue; and the failure of voters to specify their amount, in the case at bar, rendered bonds issued in pursuance of such vote invalid.— State ex rel. Lexington and St. Louis R.R. Co. v. Saline County Court, 242.

7. *Revenue — School taxes — Delinquent land list — Warrant for, made out on the county treasury.*—Under the act of 1868, concerning schools (Wagn. Stat. pp. 1246–7, §§ 18–20), the justices of a County Court are bound to issue to the township clerk, on demand, for the use of the schools, a warrant on the county treasury for the amount of the delinquent list of land taxes due the sub-school districts, without waiting until they are collected and paid into the county treasury.—Wallendorf v. The County Court of Cole County, 228.

8. *County Court, acting judicially, not subject to the control of the Circuit Court — Mandamus — Prohibition, at whose instance will lie.* — It is the settled doctrine that where the County Court acts judicially, as on its disapproval of an administrator's sale, the Circuit Court can not control its judgment. And in case of *mandamus* from the Circuit Court to compel the

COURTS, COUNTY—(*Continued.*)

County Court to approve such sale, a writ of prohibition against the former will properly lie, for the reason that, although the Circuit, by its process, obtained jurisdiction of the party, it acquired none over the subject-matter of the action of the County Court; and the writ of prohibition may issue against it at the instance of any one of the parties, or even of a stranger.—Trainer v Porter, 336.

9. *County Court — Johnson county — Judges — Term of office — Allotment — Construction of statute.* — Under the act of March 19, 1866 (Sess. Acts 1865-6, p. 82, § 1), A. was, in 1866, elected one of two justices of the County Court of Johnson, and by allotment under section 3, chapter 137, Gen. Stat. 1865, his term of office was fixed at two years. But, *held*, that the provision of the section last named, in regard to allotment, applied only to County Courts composed of three persons, and that, under section 2 of the same chapter, his term of office continued for six years.—State ex rel. Attorney-General v. Windsor, 346.

10. *Courts, County — Appellate jurisdiction — Certiorari, etc.*—When appeals from the judgments or orders of County Courts are not expressly provided for by statute, resort must be had to writs of error, *certiorari*, etc., to obtain appellate jurisdiction.—Snoddy v. Pettis County, 361.

11. *Courts, County — Appeals — Orders — Final judgment necessary to secure appeal.*— On an appeal from the order of a County Court to a Circuit Court, there should be a judgment of affirmance or reversal thereon, to entitle parties to further appeal.—*Id.*

See ROADS, COUNTY, 2.

COURT OF CRIMINAL CORRECTION.

See PRACTICE, CRIMINAL, 9.

COURTS, DISTRICT.

See JURISDICTION, 1, 2. PRACTICE, CIVIL — APPEAL, 2.

COURTS, JUSTICES'.

See JUSTICES' COURTS.

COURT, KANSAS CITY COMMON PLEAS.

1. *Courts, inferior and local — Mechanics' liens — Situation of property, averment of petition as to.*— The Kansas City Court of Common Pleas was an inferior and local court. Under the act of March 2, 1859 (Sess. Acts 1858-9, p. 353, § 5), it had "concurrent jurisdiction with the Circuit Court to enforce mechanics' or other liens in Kaw township." In a suit in that court on a mechanics' lien sought to be enforced against certain property in Kaw township, *held*, that the petition, not averring that the property was situated in that township, was fatally defective. Where the judgments of local courts and courts of inferior jurisdiction are called in question, the record should show affirmatively all the facts necessary to give them jurisdiction, both of the subject-matter of the suit and of the parties to it.—Schell v. Leland, 289.

COURTS, ST. LOUIS CIRCUIT.

1. *Circuit Court of St. Louis county — Judges, duties of — Practice, civil — Motion for a new trial.*—There is no substantial difference between the duties of the several judges of the St. Louis Circuit Court at special term and those of the Circuit Courts of the State. The court, at general term, may distribute business among the several judges; but when one enters upon a trial, he is

COURTS, ST. LOUIS CIRCUIT—(*Continued.*)

independent of the control of the other judges, except in review of his acts, and has the same power at special term to vacate and modify its judgments, decrees, or orders, rendered or made at such term, as if said court was constituted with a single judge. It is the duty of the judge who tries a case to go through with it, and hear a motion for a new trial if made; and he can not refuse to hear such motion, or transfer the case and motion to any one of his colleagues for final disposition.—Voullaire v. Voullaire, 602.

COURTS, SESSIONS OF.

See JUSTICES' COURTS, 2.

COURTS, SUPREME.

See PRACTICE, CIVIL—APPEAL.

COURTS, UNITED STATES.

See JURISDICTION, 1, 2.

CRIMES AND PUNISHMENTS.

See PRACTICE, CRIMINAL.

## D

DAMAGES.

1. *Damages—Railroad companies—Cow, killing of—Petition—Allegation of negligence, sufficiency of.*—In a suit for damages against a railroad company for killing a cow, the allegation that the act was done carelessly and negligently was sufficient, and showed a good cause of action.—McPheeters v. Hann. and St. Jo. R.R. Co., 22.
2. *Damages—Railroad companies—Injuries—Towns—Public crossings.*—Where an injury, caused by a railroad train, occurred at a public crossing in the streets of a town, no recovery could be had without proof of actual negligence.—*Id.*
3. *Damages—Negligence—Jury.*—The question of negligence is peculiarly and exclusively for the jury to determine.—*Id.*
4. *Damages—Railroad companies—Negligence—Cattle inclosures.*—The doctrine that the owner of cattle is obliged to keep them on his own premises, and that if they stray therefrom they are trespassers, and the owner is guilty of negligence, has never been the law of this State. (Gorman v. Pacific R.R. Co., 26 Mo. 441.)—*Id.*
5. *Damages—Negligence, gross negligence, meaning of terms.*—*Semble*, that in law there is no difference between negligence and gross negligence, the latter being nothing more than the former, with the addition of a vituperative epithet.—*Id.*
6. *Damages, measure of—Actions for—Care and diligence to be exercised by defendant.*—It is the established doctrine of the Supreme Court that, in an action for damages on account of negligence or unskillfulness, it should be left to the jury to say whether, notwithstanding the imprudence or neglect of the injured person, the defendant could not, in the exercise of reasonable care and diligence, have prevented the injury.—O'Flaherty v. Union Railway Co., 70.
7. *Damages—Negligence—Care and prudence to be exercised by infants.*—The same rigid rule in determining what would be a bar to an action on the

DAMAGES—(*Continued.*)

ground of contributory negligence, would not be applied to an infant, an idiot, or an insane person, as to one who had arrived at an age to possess ordinary judgment and discretion. All that is necessary to give a right of action for an injury inflicted is that the injured person shall have exercised care and prudence equal to his capacity.—*Id.*

8. *Damages — Prudence to be exercised by parents.*—To constitute negligence in parents, there must be an omission of such care as persons of ordinary prudence exercise and deem adequate in the care of children.—*Id.*

9. *Damages — Corporation liable for acts of agent, in what degree.*—Corporations, whether municipal or aggregate, are now held to the same liability as individuals; and if an agent or servant of a corporation, in the line of his employment, shall be guilty of negligence or commit a wrong, the corporation is responsible in damages.—Hilsdorf v. City of St. Louis, 94.

10. *Damages, exemplary — When given.*—In an action for damages for a trespass, where the act is aggravated, and where there has been fraud, oppression, malice, or gross negligence, the jury is allowed to award exemplary damages, not only to compensate the sufferer, but also to punish the offender. But in the absence of proof showing malice or willfulness, or other circumstances of aggravation, the damages should be compensatory merely. —Franz v. Hilterbrand, 121.

11. *Damages — Trespass — Fence, sufficiency of.*—The fence inclosing the land of A. was built within the boundary line of the land of B. In trespass for damages done to A.'s crop by cattle of B.: *held*, that the land was inclosed as required by law (Gen. Stat. 1865, ch. 80, §§ 1, 2) as a condition to recovery. If the fence was of the required character and dimensions, and was treated and used as a partition fence, that was sufficient, without regard to its ownership.—Moore v. White, 206.

12. *Damages — Trespass — Fence — Proof — Common and statute law.*—In an action of trespass for breaking through plaintiff's fence, he may sue for single damages at common law. He must comply with the statute (Gen. Stat. 1865, ch. 80) by showing, as a condition to his right of recovery, that his field was inclosed by such a fence as the law defines. But the mode of proof is not modified or affected by the statute.—*Id.*

13. *Damages — Railroads — Accident policies — General accident tickets — Vexatious delay.*—An engineer killed on a railroad locomotive had previously purchased a ticket issued by the Railway Passenger Assurance Company, which, by its terms, insured against death "caused by accident while traveling by public or private conveyance provided for the transportation of passengers." Suit being brought by his legal representatives on the policy, the proof showed that defendant was selling two classes of tickets, one known as the "travelers' risk," the other as the "general accident;" the latter being sold for the highest price; that deceased purchased the latter; that at the time of the purchase defendant's agent knew him to be an engineer, and had no instructions not to sell to railroad employees. *Held*, that deceased was insured against all accidents, without regard to the capacity in which he was acting; that the ticket was intended to cover the accident by which he met his death; and that defendant was liable. *Held, also*, that it was the duty of defendant to pay upon notification of the death of deceased, and,

DAMAGES—(*Continued.*)

on its refusal to comply, interest was thenceforth payable.—Brown v. R. W. Passengers' Assurance Co., 221.

14. *Insurance companies—Vexatious refusal, etc.—Damages determined by the jury.*—In actions against insurance companies under Gen. Stat. 1865, ch. 90. § 1, the whole question of vexatious refusal or delay in payment is to be determined by the jury. But before damages are allowed it need not be explicitly proved by plaintiff that the delay or refusal was vexatious. If, upon a full consideration of all the facts and circumstances, they conclude that the refusal was unjustifiable and vexatious, the law authorizes them to assess the damages.—*Id.*

15. *Damages — Railroad companies — Negligence a question of fact for the jury.*—In a suit by the legal representatives of A. against a railroad company for damages caused by his death, the question whether the facts constituted such negligence as to render the company responsible was exclusively for the jury to determine.—Kennayde v. Pacific R.R., 255.

16. *Railroads—Damages—Negligence of deceased must be the proximate cause of his death.*—It is incumbent upon railroad companies to exercise care and diligence; and unless the acts of a person killed by cars were the direct and proximate cause of the disaster, the company will not be excused from liability.—*Id.*

17. *Railroad companies must sound bell in passing through cities.*—Under the statute (Wagn. Stat, p. 310, § 38), it is the imperative duty of railroad companies to sound the bell, and not merely the whistle of the locomotive, in passing through cities.—*Id.*

18. *Railroads— Damages — Negligence — What care in the company may be presumed.*—The citizen who, on a public highway, approaches a railroad track, and can neither see nor hear any indication of a moving train, is not chargeable with negligence for assuming that there is no car sufficiently near to make the crossing dangerous. He had a right to presume that in handling their cars the railroad companies will act with appropriate care, and that the usual signals of approach will be seasonably given, and that the managers of the trains will be attentive and vigilant.—*Id.*

19. *Damages — Sale of land — Easement — Right of way — Clause of deed in restraint of alienation, etc.*—A. sold B. a certain tract of land lying within his own, but communicating with a public highway through a gate in the fence inclosing the land of A. The deed of purchase declared that the fence was "not to be disturbed without the permission" of A. A mere verbal statement by A. to B. of an intention to open a street from the land sold to the highway, without proof of any inducement to such statement, would not render A. liable to B. in damages for failure to open the street. The clause in the deed was in no way a restraint of alienation, and was a valid provision. —McClanahan v. Schricker, 280.

20. *Railroads — Damages — Burning fences, etc.—Negligence may be inferred, when — Contributory negligence will not excuse defendant, when.*—In an action against a railroad company for setting fire to plaintiff's fences, corn fields, etc., by sparks from its locomotive, *held* as follows:

First. The jury, in order to charge the company, must find affirmatively that the fire escaped from the smoke-stack through the negligence of its agents or servants. But when it is found that fire has been scattered by the engine

DAMAGES—(*Continued.*)

along its track, with no explanation of the cause, the jury is warranted in inferring some negligence in the company. To rebut that inference, defendant should show that the best machinery and contrivances were used in the particular case at bar to prevent the fire, and that competent servants were employed.

Second. If the conduct of defendant's agents was the immediate and direct cause of the injury, and if, with the exercise of prudence and the use of proper appliances on their part, the result might have been prevented, the defendant would not be excused, even though the proof showed some remote negligence in the plaintiff, as that he carelessly left grass in the fence corners adjacent to the road, whereby the fire was kindled. Such carelessness was not the proximate cause of the loss, and was not such contributory negligence as would excuse defendant.—Fitch v. Pacific R.R., 322.

21. *Practice, civil—Damages—Willful negligence, allegation of—Instructions.*—In a suit for damages by reason of injuries done to a mill, which were alleged to have resulted from defendant's willful negligence, the allegation of "willful" negligence in the pleading was wholly immaterial, and might have been stricken out as surplusage; and an instruction that required, as a condition to plaintiff's recovering, that the jury should find the actions or omissions complained of to have been in any sense "willful," was misleading, and proper ground for reversing the cause on appeal.—Taylor v. Holman, 371.

22. *Damages—Defect in street—Previous knowledge of on part of person injured, a fact to be submitted to the jury.*—The fact that a person injured by a defect in a highway or street had previous knowledge of the defect, is not conclusive evidence of negligence on his part. It is a fact to be submitted, with other evidence, to the jury; and in an action to recover damages for an injury caused by such defect, it is only necessary for plaintiff to show that he exercised ordinary care to avoid the accident.—Smith v. City of St. Joseph, 449.

23. *Damages—Negligence—Corporations liable for injuries happening by reason of.*—Municipal corporations are bound to keep the streets and highways in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel; and if they fail to do this, they will be held liable for all injuries happening by reason of their negligence.—*Id.*

24. *Damages—Railroad companies—Accident in town limits—Uninclosed fields—Suspended and dissolved corporations.*—In an action against a railroad company for the killing of a cow on its track, where the proof showed that the accident occurred within the limits of a town corporation, as shown by the paper plat of the town, but in fact away from any street, and in an open prairie, and in a case where the town corporation had been dissolved or suspended, the railroad company would be responsible, under the act of 1855 (Wagn. Stat. 310-11, § 43), for actual damages arising from failure to fence its track at the point of the accident, without proof of other negligence. The same action might also be brought under section 5, p. 520, Wagn. Stat.—Iba v. Hann. and St. Jo. R.R. Co., 469.

25. *Corporations aggregate liable for misfeasance or neglect at common law, although liable to penal action under statute for same offense.*—Corporations aggregate are, in general, liable for misfeasance and non-feasance, whether that liability be expressly provided for or not. And where the statute creates

DAMAGES—(*Continued.*)

a special duty on its part—such as the fencing of uninclosed prairie land, etc., by railroad companies—for the neglect of which a common-law action would lie, that action is not forbidden by the fact merely that an extraordinary liability in the nature of a penalty is also provided by the statute (Wagn. Stat. 310–11, § 43). The latter remedy is only cumulative.—*Id.*

26. *Justice's court—Jurisdiction—Venue must appear in transcript.*—In actions for injuries to cattle, etc., the justice's jurisdiction is confined to such as arise within their respective township; and when the transcript fails to show that the injury happened in the township where the justice held his court, the appeal must be dismissed.—*Id.*

See EJECTMENT, 1. EMINENT DOMAIN, 1, 2. JUSTICES' COURTS, 8. PRACTICE, CIVIL — APPEALS, 14, 15, 17. PARTIES, 2. PLEADINGS, 5. TRIALS, 16. ROADS, COUNTY, 2.

"DECLARATION AND TESTIMONY."

See PRESBYTERIAN CHURCH.

DEMAND.

See BILLS AND NOTES.

DEPOSITIONS.

See EVIDENCE, 3.

DILIGENCE.

See EQUITY, 10.

DISTRESS WARRANT.

1. *Distress warrant — Execution — Sale and deed under.*— Where the State auditor issued a distress warrant (R. C. 1855, p. 1542, § 3 *et seq.*; Wagn. Stat. 1335, § 18 *et seq.*) against a county sheriff for default in payment of public money, and on failure to collect the amount thereof, levy was made on the land of the securities on his official bond, the authority of the sheriff to convey the property to the purchaser will not be presumed from the mere recitals in the conveyance itself. The execution of the bond, the default of defendant, the issue of the warrant, the failure to collect the amount from the principal obligor, must be shown *aliunde*. In the absence of a provision similar to that touching the title vested in the grantee in case of tax sales (Wagn. Stat. 1204, §§ 111–12), such recitals in a sheriff's deed, under a distress warrant, are not even *prima facie* evidence of the regularity of the previous proceedings.—Cook v. Hacklemann, 317.

2. *Executions — Judicial sales—Executions under distress warrant.*— The act touching judicial sales (R. C. 1855, p. 748, § 56; Wagn. Stat. 612, § 54) has no application to a sale under an auditor's distress warrant.—*Id*

DOWER.

1. *Dower — Act of 1855 touching partition — Death of husband after judgment and before sale.*— Under the act of 1855, touching partition (R. C. 1855, ch. 119), the judgment of sale was the final action of the court, and the wife of a coparcener, becoming a widow after judgment and before the sale, can not be made a party and have her interest ascertained by the court. She must look to the sheriff for her portion of the proceeds of the sale.—Hinds v. Stevens, 209.

See HUSBAND AND WIFE.

# E

EASEMENT.

See DAMAGES, 19.

ECCLESIASTICAL LAW.

See PRESBYTERIAN CHURCH.

EJECTMENT.

1. *Ejectment—Occupation by plaintiff's permission, effect of—Damages—Improvements.*—If the evidence in an ejectment suit showed that defendant occupied plaintiff's land by his license, the former would not be liable to the same measure of damages or be deprived of the benefit of his improvements, as he would had his possession been wrongful.—Thomas v. Babb, 384.
2. *Ejectment—Proof of sheriff's deed proper under general issue.*—In a suit in ejectment, the deed of a sheriff conveying the property in controversy to defendant, under a judicial sale, is admissible in evidence as well under the general issue, as showing a defect of title in the plaintiff, as under special averments.—Brown v. Brown, 412.
3. *Ejectment—Title from common source—Title by defendant at sale under judgment against plaintiff—Prima facie case for plaintiff—Rebutted, how.*—It is an established principle that in ejectment suits, where both litigants claim title through the same third party it is sufficient for the plaintiff to deduce title from the common source; and when defendant claims through purchase at sheriff's sale of the property, under judgment of another against plaintiff, he thereby admits the validity of plaintiff's title up to the date of the sale, and concedes a *prima facie* case to plaintiff; and the burden of proof devolves upon him to overcome it by showing that plaintiff's title has vested in himself, or come to a determination in some other way.—*Id.*
4. *Ejectment—Sheriff's deed of plaintiff's property may be shown under general issue.*—In an action in ejectment, defendant may, under the general issue, show title in himself to the property by proof of judgment and execution against plaintiff, and purchase of the property in controversy by himself at sheriff's sale.—Meyers v. Gale, 416.
5. *Equity—Legal estate and possession in defendant as trustee of plaintiff—Ejectment, improper—Suit should be brought in equity.*—When the legal title and the right of possession of a portion of certain land were in defendant, as the trustee of plaintiff, and nothing showed any actual ouster or disseizin by defendant, plaintiff could not sue in ejectment, but should resort to a suit in equity for partition, subject to the terms of the deed of trust.—Reed v. Robertson, 580.

See RAILROADS, 4.

ELECTIONS.

1. *Election—St. Louis County Court—Term of office of judge appointed to fill vacancy—Construction of statute.*—Under section 2 of the amendatory act concerning St. Louis county (Adj. Sess. Acts 1863–4, p. 279), the term of office of a judge appointed to fill a vacancy in the St. Louis County Court, continued only until the next general election, and not till the next regular election of county judge, as contemplated by the act of January 6, 1860. (Sess. Acts 1859–60, p. 524, § 12.)—State v. Conrades, 45.

ELECTIONS—(*Continued.*)

2. *Elections — Terms "regular" and "general," meaning of.*—When applied to elections, the terms "regular" and "general" are used interchangeably and synonymously.—*Id.*
3. *Elections — Appeal — Act of 1867, construction of.*—The manifest intention of the act of 1867 (Wagn. Stat. 578, §§ 92-3), providing for appeals in contested election cases, was to allow a trial *de novo* in the Circuit Court.—Boggs v. Brooks, 232.
4. *Election — Contest — Count of votes, final — Term of notice — Mode of contest in certain case by quo warranto.*— Within eight days after an election, the county clerk, under the statute touching elections (Wagn. Stat. 569, § 25), proceeded to cast up the votes, and gave a certificate of election to A. Afterward, B. giving notice that he would contest the election, he made a second count and gave a certificate to B. Within twenty days after the second count, but more than twenty days after the first, A. also gave notice that he would contest the election. *Held,* 1st, that the duty of the clerk was simply ministerial, and when finished was wholly performed, and that the second count of votes and award of certificates was invalid and null; *a fortiori,* if made after the eight days had expired, and the matter had been removed by notice of contest to the Circuit Court; 2d, that the requirements of the statute concerning twenty days' notice (Wagn. Stat. 573, § 52) was imperative, and that the notice was insufficient, not having been given within twenty days from the first count; 3d, that the proper remedy in such case is by *quo warranto* in the Circuit Court.—Bowen v. Hixon, 340.

EMINENT DOMAIN.

1. *Eminent domain — Land taken for railroads — Damages, assessment of.— Construction of statute.*—Under the act for the appropriation and valuation of land taken for telegraph and other purposes (Wagn. Stat. 327-8, §§ 3, 4), unless the court is clearly satisfied that the commissioners appointed to assess damages have erred in the principles upon which they have made their appraisals, their report should not be disturbed by review or a new appraisement.—St. Louis and St. Joseph Co. R.R. v. Richardson, 466.
2. *Eminent domain — Land taken for railroads—Benefits, assessment of, how estimated.*— The settled law of this State is that in assessment of damages for land taken for railroad purposes (Wagn. Stat. 327-8, §§ 3, 4) the benefit derived which is to be taken into account is the direct and peculiar benefit resulting to the land in particular—not the general benefit accruing to it in common with other land which is enhanced in value by the building of the road.—*Id.*

EQUITY.

1. *Equity — Lands, sale of — Specific performance, discretion of court in enforcing.*—Whether a decree for specific performance shall be awarded in any particular case, is always a matter resting in the sound and reasonable discretion of the court; and it is held to be a reasonable exercise of this power to deny a decree when its allowance would be harsh or oppressive in its operation on either party.—Taylor v. Williams, 80.
2. *Contracts, specific enforcement of — Must be precise, etc.*—Contracts sought to be specifically enforced must not only be proved in a general way, but their terms must be so precise and exact that neither party could reasonably mis-

EQUITY—(*Continued.*)

understand them, and those terms must be satisfactorily established by the evidence.—*Id.*

3. *Sale—Real estate—Deed of trust—Re-sale.*—At a sale of real estate under a deed of trust, when the highest bidder fails to pay the purchase money, the property may be re-sold by the trustee. (44 Mo. 145; 38 Mo. 469.)—O'Fallon v. Kennerly, 124.

4. *Equity—Sale—Specific performance, when granted—Executory contract.*—Equity may decree a specific performance of a contract for the sale of property, notwithstanding a default in payment upon the day specified, and in many cases where there is an express stipulation of forfeiture. But this relief has always been afforded upon equitable principles, and some circumstances must exist to show that the party is justly entitled to it. There is no respectable case, where the contract is wholly executory and the time specific when the purchase money shall be paid, with an express condition of forfeiture if not paid at that time, and where the purchaser has never taken possession or expended anything on the premises, but waits for several years after the payments are due, and until there is a rise in value, in which the purchaser can obtain relief.—*Id.*

5. *Equity—Taxes, lands sold for, redemption of—Ignorantia legis.*—Within the time allowed to redeem certain lands sold for taxes, the owner, having been in the military service, made tender, under the act of March 12, 1867, of the amount of the tax, with ten per cent. interest. This being refused, he filed his petition to enjoin the delivery to the purchaser of his tax deed. The court, after the proceeding had remained in court till after the time for redemption had expired, decided the act relied on to be unconstitutional and the claim of the owner to be invalid, but allowed him to add to his tender the amount required by the statute to redeem, although the time of redemption had lapsed, and on payment of costs made the injunction perpetual. *Held,* that the rule *ignorantia legis,* etc., did not apply to such case, especially as the delay beyond the time of redemption was caused in part by the action of the court, and that equity in the premises properly relieved against such mistake of law.—Haney v. Charles, 157.

6. *Equity—Relief—Jurisdiction—Judgments, when not impeachable collaterally.*—A judgment, even though informal to the extent of granting a relief not contemplated by the petition, when parties are before the court and the relief is within its jurisdiction, is not a void proceeding, and can not be impeached collaterally.—O'Reilly v. Nicholson, 160.

7. *Equity—Devises of lands; of money in lieu of—Election—Conveyance of land pending election—What title conveyed.*—When the testator devises the interest of certain heirs in a specified tract of land to other members of his family, and also devises to said heirs certain moneys as their full share and just proportion of the land, the equity doctrine of election applies; the appearance of the heirs in court and their renunciation of the land is also an election; and the attempted conveyance by them, and its acceptance by the purchaser during suit in partition of the land, and while the election is being made, especially when the purchaser acted as a sort of attorney for them, and drew and swore them to their answer in that suit, is a gross and naked fraud attempted to be perpetrated upon the other heirs of the testator,

EQUITY—(*Continued.*)

a contempt of the court in which the proceedings are pending, and possesses no validity whatever.—*Id.*

8. *Equity — Improvements by husband on land of wife — Value of, reached by his creditors.*— The value of improvements placed by the husband on the land of the wife may be reached through appropriate chancery proceedings, and the amount thereof applied to the payment of claims existing against him at the time of such investment. In such case, when the estate can not be successfully apportioned in partition, chancery will decree a sale of it, and a division of the proceeds according to the rights of the respective parties.—Kirby v. Bruns, 234.

9. *Practice, civil — Case involving law and equity — Voluntary non-suit, effect of.*—Where a suit involving legal and equitable proceedings was laid before a jury, and plaintiff voluntarily took a non-suit of the case without submitting the equity branch to court at all, this court will not relieve him.—*Id.*

10. *Mortgages — Mortgagor may become purchaser, when.*— Where the mortgagor is privy to the sale of the mortgaged property, assents to the acquisition of title by the mortgagee, and afterward concurs in it, and there is no suspicion of fraudulent practice, the mortgagee may become the purchaser at his own sale; and the mere fact that at the time of the purchase he stipulates with the mortgagor for a re-acquisition of the property on repayment of the purchase money, will not, in the absence of proof showing an intention to that effect, remit the parties to their original relation as mortgagor and mortgagee. In such case the mortgagor could not, after slumbering in his rights for five years, enforce such stipulation in an action of ejectment.—Medsker v. Swaney, 273.

11. *Fraud — Mortgage sale — Verbal agreement by mortgagor to reconvey — Effect of, as fraud in fact.*— Although in case of purchase by the mortgagee of mortgaged property, a mere verbal agreement by him to reconvey, on being reimbursed his advance, as a contract, would be invalid, as being within the statute of frauds; yet a refusal to convey within a year, or within a reasonable time, if that was the understanding, on being tendered his money, may be, in the absence of a satisfactory explanation, sufficient evidence of fraud in fact to set aside the conveyance and admit the mortgagor to his right of redemption.—*Id.*

12. *Equity—Injunction to stay judgment—What diligence in defending original suit must be shown.*—A., who being personally and duly served with process, permits judgment to go against him by default, can not enjoin its execution on the ground that he was kept away from attendance at court by threats of bodily harm. Such allegation shows no use of reasonable diligence in his endeavors to defend. *Non constat* but he might have defended through counsel, without his personal attendance.—Duncan v. Gibson, 352.

13. *Equity — Sheriff's sale — Misdescription — Purchase—Action for recovery of purchase money — Caveat emptor.*—A. owned certain described land in the north-*west* quarter of section *thirty*-five, township sixty, range thirty-six. Under execution against him, the sheriff, by mistake, sold and deeded to B. a tract similarly described in the north-*east* quarter of section *twenty*-five of the same township and range, to which A. had no title. The purchase money was paid, and went to extinguish the judgment against A. Supposing the land to be his, A. surrendered it to B., who moved on it and made improve-

EQUITY—(*Continued.*)

ments. Afterwards, discovering the misdescription, A. regained possession, claimed the land, and refused to refund the purchase money. *Held*, that the doctrine *caveat emptor* had no application to such a case; that the consideration for the money paid on execution had failed, B. having no title to the land, and that an action for the recovery of the money so paid was properly maintainable.—McLean v. Martin, 393.

14. *Equity—Bill to rescind contract of sale of land—New consideration—Actual abandonment.*—A verbal agreement to rescind a contract under seal for the sale of land, made after payments are due, and founded upon no new consideration, unless followed by an actual abandonment of the sale by both parties and a restoration of the property, so far as possible, to the vendor, will be treated as invalid in a suit by the vendor for the stipulated purchase money.—Pratt v. Morrow, 404.

15. *Equity—Conveyances to hinder and delay creditors—Solvency of grantor, etc.*—In a suit in equity against a father and son to set aside a conveyance made by the former to the latter, the proof showed that at the time of the conveyance, in 1852, and long afterward, the father was in good circumstances and abundantly able to meet all his current liabilities. The testimony of certain witnesses having no personal interest in the matter, and given many years after the occurrence, showed that the father had said that the conveyance was made to defeat the collection of a security debt of fifty dollars, of the existence of which the only proof was his own statement. He testified that he paid the debt before judgment; that at the time of the purchase he had no recollection of its existence. *Held*, that the evidence showed no such fraud as to invalidate the deed.—Grimes v. Russell, 431.

16. *Injunction, when will lie in case of trespass.*—An injunction will not be awarded to restrain the commission of an ordinary trespass when the injury flowing from it is not irreparable, and where an adequate remedy may be had in the recovery of damages against a solvent party; but it will lie where the acts done or threatened are ruinous to the property trespassed upon, or are of a character to permanently impair its just enjoyment in the future.—Echelkamp v. Schrader, 505.

17. *Injunction—When title to locus in quo is uncertain, temporary injunction will be granted.*—When the right or title to the place in controversy, or to do the act complained of, is doubtful and explicitly denied in the answer, no permanent or perpetual injunction will usually be granted till such trial at law is had settling the contested rights and interests of the parties. In such case, where plaintiff is in possession of the title to the *locus in quo*, defendant is the proper party to bring the action to test the rights of the respective parties; and in the event of his failure to do so, the injunction should be made perpetual.—*Id.*

18. *Equity—Injunction allowable against trespasser, when.*—It is now a well-settled principle of equity jurisprudence that the remedy by injunction is allowable against a mere trespasser when the injury sought to be averted goes to the destruction of the inheritance, or is otherwise irreparable in its character. But the sole ground upon which an injunction is granted in such cases is that the trespass complained of operates such irreparable mischief that it is not susceptible of adequate compensation in the way of pecuniary damages;

EQUITY—(*Continued.*)

and the party seeking it must bring himself within this principle before he can be entitled to this remedy.—Weigel v. Walsh, 560.

19. *Equity — Proceedings in partition.*—A proceeding in chancery may be had for the partition of an equitable estate. (Welch v. Anderson, 28 Mo. 293; Reinhardt v. Wendeck, 40 Mo. 577.)—Reed v. Robertson, 580.

20. *Equity — Partition of equitable estate — What averments sufficient.*— In a suit for the partition of equitable interests in real property, an averment of the petition that each party held an undivided half of the equitable estate, is sufficient, without any allegation that they held jointly or as tenants in common.—*Id.*

21. *Equity—Legal estate and possession in defendant as trustee of plaintiff—Ejectment, improper — Suit should be brought in equity.*—When the legal title and the right of possession of a portion of certain land were in defendant, as the trustee of plaintiff, and nothing showed any actual ouster or disseizin by defendant, plaintiff could not sue in ejectment, but should resort to a suit in equity for partition, subject to the terms of the deed of trust.—*Id.*

See ATTACHMENTS, 2. LANDS AND LAND TITLES, 13.

ERRORS, CLERICAL.

See PRACTICE, CIVIL — JUDGMENTS, 5.

ERROR, WRIT OF.

See PRACTICE, CIVIL — APPEAL.

EVIDENCE.

1. *Evidence—Certificate of deposit — Manual delivery, effect of.*—A. deposited a certain fund in bank, and, as evidence of his title, took a certificate of deposit payable to his own order. His title thus acquired must be presumed to continue until a divestment of it is shown, and a mere manual delivery of the certificate to B. without indorsement, and unaccompanied with evidence of a consideration paid, would not pass the title as against A. —Vastine, Adm'r, v. Wilding, 89.

2. *Practice, civil — Instructions — Evidence — Account, note given in payment of — Receipt — Jury.*—In a suit on an account, the mere acceptance by the plaintiff of notes given by defendant for the debt, and the giving of a receipt for the amount due, without further proof, does not constitute such evidence of payment as to warrant the court in sending the case to the jury.—Doebling v. Loos, 150.

3. *Practice, civil — Trial — Evidence — Deposition in former suit, when admissible — Privity of parties, etc.*—Suit in ejectment was brought by the son against the father, and the deposition of the latter was taken, full opportunity being given for cross-examination. Pending the trial the father died, and the suit was discontinued. Subsequently one involving the same issues was brought by the son against the father's widow, and his deposition filed in the latter suit. *Held*, that the deposition was admissible in evidence. To that end, complete identity of parties in the two actions was not required. It was sufficient that the defendants were in privity with each other. *Held, further*, that, there being no objection to the deposition on the ground of incompetency at the time it was taken, the subsequent decease of deponent would not, under the statute (2 Wagn. Stat. 1372, § 1), deprive the party of its benefit. —Parsons v. Parsons, 265.

EVIDENCE—(*Continued.*)

4. *Crimes and punishments — Passing forged checks — Evidence — Handwriting — Comparison.*— In an action for passing a counterfeit or forged bank check, where the signature and indorsement were positively proved, and no other papers were introduced in evidence for the purpose of admitting testimony by comparison, it was competent to submit the whole paper to the jury, with or without the aid of experts, for them to form their own conclusion as to whether the whole instrument thereon was produced by one and the same hand.—State v. Scott, 302.
5. *Agent—Testimony of, binding on principal, when—Practice, civil—Actions ex contractu.*—In a suit against a sheriff for pasturage of certain cattle seized under execution, a promise to pay the amount claimed, by one who acted as his deputy in the transaction of the business, is binding on the sheriff. In such case, if the cattle remained in the plaintiff's pasture by his permission, he would be entitled to a reasonable compensation, even though they were originally placed there against his consent. Plaintiff, on such a state of facts, could properly recover in an action *ex contractu.*—Stephenson v. Porter, 358.
6. *Deeds—Lost instrument—Proof of loss, what sufficient—How determined.*—In order, under the statute (Gen. Stat. 1865, p. 448, § 38; Wagn. Stat. 279, § 38), to introduce secondary evidence of the contents of a deed, parties should show that they have in good faith reasonably exhausted all probable sources of information and means of discovery which the facts and circumstances of the case are calculated to suggest, and which are at the time within their reach. But no definite rule on the subject, applicable to all cases, can be laid down. The question whether the loss is sufficiently proved in any given case must be determined by the judge trying the cause, and is addressed to his judicial discretion.—Christy v. Kavanaugh, 375.

See BILLS AND NOTES, 18. CONVEYANCES, 12. DAMAGES, 15. EJECTMENT, 2, 3, 4. EXECUTION, 4. FRAUDS, STATUTE OF, 3. INSURANCE, 1. JUSTICES' COURTS, 2. LANDLORD AND TENANT, 11. LANDS AND LAND TITLES, 3. MERCHANTS, 1. PRACTICE, CIVIL—APPEAL, 10, 13, 15. PRACTICE, CIVIL—TRIALS, 1, 13, 15.

EXCEPTIONS.

See PRACTICE, CIVIL—APPEAL.

EXECUTIONS.

1. *Executions—Act March 23, 1863—Fresh levies after return day, effect of.*—Where an execution was levied, prior to the return day thereof, on certain property, it would not continue in force, under the act of March 23, 1863 (Sess. Acts 1863, p. 20, § 2), for the purpose of a fresh and independent levy on other property after the return day of the execution. Under that act the execution would afterwards be dead for all purposes, except the preservation of rights which attached prior to the return day by virtue of the antecedent levy.—McDonald v. Gronefeld, 28.
2. *Sheriff—Bond, liability on—Section 30, chapter 63, R. C. 1855.*—The obligor in a bond of indemnity given under section 30, ch. 63, R. C. 1855, is liable thereon to the sheriff as well as to persons claiming the property.—Stewart v. Thomas, 42.
3. *Sheriff—Execution—Indemnity bond, suit on, by sheriff—Notice to plaintiff in execution.*—Where judgment is rendered against a sheriff on his bond,

EXECUTIONS—(*Continued.*)

for an unlawful levy, and he afterward sues plaintiff in the execution on his bond of indemnity (R. C. 1855, ch. 63, § 30), the latter may make any defense which could have been made in the original suit against the sheriff. Notice, with opportunity of making the defense, should have been given the plaintiff in the execution at the time of the first suit. Otherwise, the judgment is but *prima facie* evidence of his liability on the bond.—*Id.*

4. *Distress warrant — Execution — Sale and deed under.*—Where the State auditor issued a distress warrant (R. C. 1855, p. 1542, § 3 *et seq.*; Wagn. Stat. 1335, § 18 *et seq.*) against a county sheriff for default in payment of public money, and on failure to collect the amount thereof, levy was made on the land of the securities on his official bond, the authority of the sheriff to convey the property to the purchaser will not be presumed from the mere recitals in the conveyance itself. The execution of the bond, the default of defendant, the issue of the warrant, the failure to collect the amount from the principal obligor, must be shown *aliunde.* In the absence of a provision similar to that touching the title vested in the grantee in case of tax sales (Wagn. Stat. 1204. §§ 111–12), such recitals in a sheriff's deed, under a distress warrant, are not even *prima facie* evidence of the regularity of the previous proceedings.—Cook v. Hacklemann, 317.

5. *Executions—Judicial sales—Executions under distress warrant.*—The act touching judicial sales (R. C. 1855, p. 748, § 56; Wagn. Stat. 612, § 54) has no application to a sale under an auditor's distress warrant.—*Id.*

6. *Sales — Sheriff's, at Circuit Court-house door, during session, are valid, etc.*—Judgment was obtained in the Common Pleas Court of Cass county, while in session at Pleasant Hill, and execution was issued therefrom. But the sale by the sheriff was made at the court-house door of the Circuit Court, at Harrisonville, the county seat, during a term of the Circuit Court, and not at the place where the Common Pleas Court was held, nor during a session thereof. *Held,* that, under the statute concerning judicial sales (Wagn. Stat. 609, § 42), such sale was valid.—Mers v. Bell, 333.

7. *Executions—Garnishment—Justice's court—Jurisdiction—Judgment against garnishee before return day of writ.*—The statute limiting the jurisdiction of justices (Sess. Acts 1868, p. 59, § 1) has no application to garnishment proceedings. Under sections 27-40, Gen. Stat. 1865, the garnishee is authorized, without any resort to the justice at all, to deliver property or pay money sufficient to satisfy the execution, without regard to its amount; and the justice's jurisdiction as to the amount of his judgment is co-extensive with the authority given to the garnishee to pay over to the constable. In such case the justice may render judgment against the garnishee without waiting for the return day of the writ.—Davis v. Staples, 567.

8. *Execution—Justice's court—Garnishee entitled to injunction against plaintiff in execution, when.*—A garnishee in execution, before a justice, is not entitled to an injunction against the plaintiff simply on the ground that the amount seized exceeded the jurisdiction of the justice, or that judgment was entered against him before the return day of the writ. To entitle him to this remedy he must make a showing that it would be against conscience to execute the judgment complained of; that he has not been remiss in his

EXECUTIONS—(*Continued.*)

own duties, and that he has been deprived of his right by some fraud or accident.—*Id.*

See CORPORATIONS, 10, 17. JUSTICES' COURTS, 6. PRACTICE, CRIMINAL, 8, 9. REPLEVIN, 1.

## F

FEES.

See CIRCUIT ATTORNEYS.

FENCES.

See DAMAGES, 10, 11, 20.

FIXTURES.

See LANDLORD AND TENANT, 1, 2. MECHANICS' LIEN, 1, 2.

FORCIBLE ENTRY AND DETAINER.

See LANDLORD AND TENANT.

FORGERY.

See PRACTICE, CRIMINAL.

FRAUD.

See ADMINISTRATION, 4, 5, 6. COURTS, COUNTY, 2. FRAUDS, STATUTE OF. FRAUDULENT CONVEYANCES. MORTGAGES AND DEEDS OF TRUST, 1, 2.

FRAUDS, STATUTE OF

1. *Land, sale of—Part performance—Escrow—Delivery of deed.*—A. made a verbal contract with B. for the purchase of certain land. Part of the purchase money was paid at the time. The remainder was to be paid in two weeks, when a warrantee deed for the property was to be given. The deed in the meantime was deposited with a third party as an escrow. At the time named for completing the contract, A. refused to pay the remainder, and having purchased of C., who held adversely to B., went into possession under him. *Held*, that the facts showed no such part performance as to take the case out of the statute of frauds. Such a deposit of the deed could not be made to operate as a delivery. At law the statute would be a complete bar to an action to recover the money due, even if the contract were so performed as to make it a fraud to seek to evade it.—Townsend v. Hawkins, 286.
2. *Statute of frauds — Contracts not to be performed in one year, executed by one party, statute can not be invoked by the other.*—The purchaser of a carding machine, by a verbal agreement with the vendor, bound himself not to use any other carding machine in the vicinity of the one sold, for a period of four years. In suit by the vendor for breach of the contract, *held*, that although the contract could not be wholly performed within one year, yet, having been completely executed by the plaintiff, defendant could not interpose the statute of frauds.—Self v. Cordell, 345.
3. *Frauds, statute of—Evidence of parol lease inadmissible, under petition counting on written instrument.*—In an action of damages for breach of a lease, where the petition counted upon a written lease when there was no such lease, but only a contract to pay money in consideration of a lease, it was

FRAUDS, STATUTE OF—(*Continued.*)

incompetent to offer in support of that count either a parol lease or the written promise of defendant to pay money; and the court committed no error in ruling them out. But had the petition set out a parol lease, it would have been competent to prove it as well as the written agreement. In such case the agreement under which defendant was sought to be charged under the statute of frauds was the written obligation to pay rents.—Browning v. Walbrun, 477.

FRAUDULENT CONVEYANCES.

1. *Equity — Conveyances to hinder and delay creditors — Solvency of grantor, etc.*—In a suit in equity against a father and son to set aside a conveyance made by the former to the latter, the proof showed that at the time of the conveyance, in 1852, and long afterward, the father was in good circumstances and abundantly able to meet all his current liabilities. The testimony of certain witnesses having no personal interest in the matter, and given many years after the occurrence, showed that the father had said that the conveyance was made to defeat the collection of a security debt of fifty dollars, of the existence of which the only proof was his own statement. He testified that he paid the debt before judgment; that at the time of the purchase he had no recollection of its existence. *Held*, that the evidence showed no such fraud as to invalidate the deed.—Grimes v. Russell, 431.
2. *Fraudulent conveyances — Purchase of goods procured upon credit by the vendor from a third party, upon fraudulent representations made by the vendee, effect of.*—Where the creditor of a firm in failing circumstances made such false representations to a third party as to induce him to sell goods to the debtor upon credit, and the original creditor afterwards obtained these goods in payment of his pre-existing debts, *held*, that although a clear case of liability in a direct action thus arises against him, he is not, therefore, incapacitated to purchase the goods.—State, to use of Steinberger, v. Schulein, 521.
3. *Fraudulent conveyances — Stock in trade — Change of possession.*—When the original merchants are employed as clerks after the sale, there should be such marks of change that customers would be advised that the store had a new proprietor. (Claflin v. Rosenberg, 42 Mo. 439, affirmed.)—*Id.*

## G

GARNISHMENT.

See ATTACHMENT. BILLS AND NOTES, 13. JUSTICES' COURTS, 9, 10.

## H

HUSBAND AND WIFE.

1. *Conveyances — Fee simple — To married woman — Authority of to convey, with remainder over to heirs, etc.*—Certain land was conveyed to a married woman and her trustee, "to be sold and conveyed in fee, mortgaged, or rented," as she might, in writing, direct. The deed further provided that, in case of her death before her husband's, the estate might vest in her surviving children. *Held*, that her authority to convey was absolute and unlimited, and

HUSBAND AND WIFE—(*Continued.*)

that the latter provision did not affect her power of alienation during the life of her husband: *semble*, that equity will enforce specific performance of a contract to purchase an estate so conveyed, upon tender of deed to the purchaser.—Jecko, Trustee of Hume, v. Taussig, 167.

2. *Partition—Wife of coparcener can not be party.*—It is unnecessary to make the wife of a person interested in the partition of lands a party to a proceeding for partition therein. (Lee v. Lindell, 22 Mo. 202.) If the land be divided in specie, her inchoate right attaches at once to her husband's share. If it be sold, she has no claim to any portion of the proceeds.—Hinds v. Stevens, 209.

3. *Dower—Act of 1855 touching partition—Death of husband after judgment and before sale.*—Under the act of 1855, touching partition (R. C. 1855, ch. 119), the judgment of sale was the final action of the court, and the wife of a coparcener, becoming a widow after judgment and before the sale, can not be made a party and have her interest ascertained by the court. She must look to the sheriff for her portion of the proceeds of the sale.—*Id.*

4. *Equity—Improvements by husband on land of wife—Value of, reached by his creditor.*—The value of improvements placed by the husband on the land of the wife may be reached through appropriate chancery proceedings, and the amount thereof applied to the payment of claims existing against him at the time of such investment. In such case, when the estate can not be successfully apportioned in partition, chancery will decree a sale of it, and a division of the proceeds according to the rights of the respective parties.—Kirby v. Bruns, 234.

5. *Husband and wife—Married women, act of 1865 concerning—Separate property of wife, acquired before act, not exempt under execution against husband.*—Under the act as to rights of married women (Gen. Stat. 1865, p. 464, § 14) there is no exemption of the interest of the husband in his wife's real estate, acquired in virtue of the marriage, from seizure and sale in satisfaction of his separate debts contracted after marriage and after the acquisition of her estate, when such indebtedness accrued and such real estate was acquired prior to that act becoming law. In its operation it acts only prospectively. Exemption acts of such character do not impair the pre-existing rights of creditors.—Meyers v. Gale, 416.

6. *Contracts—Marriage by slaves may be validated after emancipation.*—Slaves, in entering into marriage, do a moral act; and although not binding in law, it is no violation of any legal duty; and, as in the case of other parties incapacitated (as minors or insane persons), the contract may be assented to and ratified after the incapacity or disability is removed. It can make no difference that in his earlier days the husband had been already married; his first marriage had no legal existence. He was at liberty to repudiate it at pleasure; and by his continuing to live with his second wife, and acknowledging her as his lawful wife, after he had obtained his civil rights, he disaffirmed his first marriage and ratified his second.—Johnson v. Johnson, 595.

See DOWER. PRACTICE, CIVIL—PARTIES, 2. PRACTICE, CRIMINAL, 10, 12.

# I

INDORSEMENT.

See BILLS AND NOTES.

INFANTS.

1. *Judgment — Infants — Guardian ad litem — Void and voidable judgment.* — A judgment against an infant, who appears by attorney and not by guardian, although irregular and reversible on error, is merely voidable, and not absolutely void, so as to enable defendant to successfully resist a subsequent action upon it.—Townsend v. Cox, 401.

2. *Infants — Guardians — Religious faith.* — The provision (Wagn. Stat. 675. § 21) which prohibits committing the care of a minor to a person of religious persuasion different from that of the parents of the minor, if another suitable person can be found, etc., was adopted to secure in this matter the absolute equality before the law of all forms of religious faith. But where the record does not show that any person of the faith of the parents offered to take the children, and a person of different faith, but every way suitable otherwise, offered to take charge of them, *held*, that the action of the court in committing the care and custody of the children to this person was in no respect a violation of that provision.—Voullaire v. Voullaire, 602.

See DAMAGES, 7.

INJUNCTION.

See EQUITY, 10, 16, 17, 18. LANDLORD AND TENANT, 2. TRADE MARK, 1.

INSTRUCTIONS.

See PRACTICE, CIVIL—TRIALS. PRACTICE, CRIMINAL.

INSURANCE.

1. *Insurance — Action on policy — Request to exhibit books, etc. — Refusal — Pleadings as to.* — In an action on an insurance policy, the condition contained in the policy, that the insured, if requested, should exhibit to the insurer, upon adjustment of loss, his books of account, invoices, etc., is not included in a general allegation by plaintiff of performance of conditions precedent to a right of recovery. Such condition can only be brought into the record by defendant; and if he does not tender an issue upon it, it is outside of the case. Defendant's answer having alleged demand for the books of account, etc., and refusal or neglect to exhibit them, plaintiff should deny the one or the other, or give some excuse for not complying with the demand. In such case plaintiff could not introduce evidence showing waiver by defendant of the production of books, etc., unless the waiver were pleaded in the replication.—Mueller v. Putnam Fire Insurance Co., 84.

2. *Insurance.* — The rules of an insurance company provided that certain kinds of property might be insured, "if approved, at special rates," and that such special risks should be approved by an executive committee of three directors before a policy on the property should be issued. The by-laws of the company vested in the president a general supervision of its affairs. Property of the kind specified was insured at special rates, and the policy issued thereon was signed by the president and secretary, as required by the by-laws, but without the action of the executive committee. *Held*, that the policy being issued by the duly authorized agents of the company, and upon a full knowl-

INSURANCE—(*Continued.*)

edge of all the facts material to the risk, the company was liable on the policy, notwithstanding the non-action of the committee. The action of the committee was preliminary, and in this case must be held to have been waived.—Merchants' and Manufacturers' Insurance Co. v. Curran, 142.

3. *Agency—Skill and discretion—Agency not delegated.*—It is a settled principle in the law of agency that where an authority is conferred requiring skill or discretion on the part of an agent, and no power of substitution is given, then the agent must act in person, and the principal would not be bound by any act of a sub-agent. But this doctrine has no application to the responsibility of an accident insurance company for acts of its sub-agents.—Brown, Adm'r, v. Railway Passengers' Assurance Co., 221.

4. *Damages—Railroads—Accident policies—General accident tickets—Vexatious delay.*—An engineer killed on a railroad locomotive had previously purchased a ticket issued by the Railway Passengers' Assurance Company, which, by its terms, insured against death "caused by accident while traveling by public or private conveyance provided for the transportation of passengers." Suit being brought by his legal representatives on the policy, the proof showed that defendants were selling two classes of tickets, one known as the "traveler's risk," the other as the "general accident;" the latter sold for the highest price; that deceased purchased the latter; that at the time of the purchase defendant's agent knew him to be an engineer, and had no instructions not to sell to railroad employees. *Held*, that deceased was insured against all accidents, without regard to the capacity in which he was acting; that the ticket was intended to cover the accident by which he met his death; and that defendant was liable. *Held, also*, that it was the duty of defendant to pay upon notification of the death of deceased, and, on its refusal to comply, interest was thenceforth payable.—*Id.*

5. *Insurance, accident, contract of—Stipulations, how construed.*—In a contract of insurance containing mutual stipulations, each stipulation is to be construed favorably to the party entitled to claim its benefit.—*Id.*

6. *Insurance companies—Vexatious refusal, etc.—Damages determined by the jury.*—In actions against insurance companies under Gen. Stat. 1865, ch. 90, § 1, the whole question of vexatious refusal or delay in payment is to be determined by the jury. But before damages are allowed, it need not be explicitly proved by plaintiff that the delay or refusal was vexatious. If, upon a full consideration of all the facts and circumstances, they conclude that the refusal was unjustifiable and vexatious, the law authorizes them to assess the damages.—*Id.*

7. *Fire insurance—Policy—Conditions—Meaning of words "partial" and "total" modified by understanding of parties.*—Attached to a fire insurance policy were the following conditions: "2. In case of total loss the company is not liable to pay more than two-thirds of the actual value of the building at the time of the loss, nor more than one-half the value of the personal property;" and "3. Partial losses are paid in full, not exceeding the amount insured, provided the insured has on hand the lowest amount stated in the application." The amount of goods to be kept on hand was stated in the application to be of the value of $3,000. The loss of the insured was $3,859, property of the value of some seventy dollars having been saved—making the total value of the stock on hand at the time of the loss, $3,929. *Held*, that

INSURANCE—(*Continued.*)

the words "at the time of the loss," mentioned in the second clause, were applicable not only to the real property, but the merchandise on hand at that particular time; and that, within the true meaning of the two clauses taken together, the loss was not partial, so as to entitle the insured to recover the full amount of his insurance. The meaning of the words "partial" and "total" should be taken subject to such modification as may be necessary to an ascertainment of the actual understanding and intention of the parties.—Singleton v. Boone County Home Mutual Insurance Co., 250.

See CORPORATIONS,

## J

JEFFERSON CITY.

See BONDS, MUNICIPAL, 1, 2.

JOHNSON COUNTY.

See COURTS, COUNTY, 9.

JUDGMENTS.

See JUSTICES' COURTS. PRACTICE, CIVIL—JUDGMENTS.

JUDICIAL NOTICE.

See JUSTICES' COURTS, 2.

JURISDICTION.

1. *District Courts, jurisdiction of—Admiralty—Maritime liens.*—Maritime contracts, in the sense used in admiralty practice, and marine torts, in cases where a maritime lien arises, belong to the exclusive and original jurisdiction of the District Courts of the United States; and therefore those provisions in the statutes of this State which authorize actions *in rem* against vessels by name in such cases, are not sustainable.—Mitchell v. Steamboat Magnolia, 67.
2. *Admiralty—Steamboats, equipment of, at home port—Jurisdiction of State courts.*—The furnishing of the material for the equipment and outfit of a steamboat, at her home port, is not a regulation of commerce nor a maritime contract, but such a contract as it is competent for the States to act upon, and to create such liens in relation to, as their Legislatures may deem just and expedient.—*Id.*
3. *Mandamus—Jurisdiction of Circuit Courts by, over County Courts—Roads—Assessment of damages.*— In the matter of paying damages assessed for the right of way on a public road, Circuit Courts have jurisdiction over the County Court by *mandamus*, and in a proper case may issue the writ; and a writ of prohibition will not issue to prevent its erroneous exercise.—Berkstresser v. Rice, 283.
4. *Courts, inferior and local—Mechanics' liens—Situation of property, averment of petition as to.*—The Kansas City Court of Common Pleas was an inferior and local court. Under the act of March 2, 1859 (Sess. Acts 1858–9. p. 353, § 5), it had "concurrent jurisdiction with the Circuit Court to enforce mechanics' or other liens in Kaw township." In a suit in that court on a mechanics' lien sought to be enforced against certain property in Kaw township, *held*, that the petition, not averring that the property was situated in that township, was fatally defective. Where the judgments of local courts

JURISDICTION—(*Continued.*)

and courts of inferior jurisdiction are called in question, the record should show affirmatively all the facts necessary to give them jurisdiction, both of the subject-matter of the suit and of the parties to it.—Schell v. Leland, 289.

5. *County Court, acting judicially, not subject to the control of the Circuit Court — Mandamus — Prohibition, at whose instance will lie.* — It is the settled doctrine that where the County Court acts judicially, as on its disapproval of an administrators's sale, the Circuit Court can not control its judgment. And in case of *mandamus* from the Circuit Court to compel the County Court to approve such sale, a writ of prohibition against the former will properly lie, for the reason that, although the Circuit, by its process, obtained jurisdiction of the party, it acquired none over the subject-matter of the action of the County Court; and the writ of prohibition may issue against it at the instance of any one of the parties, or even of a stranger.—Trainer v. Porter, 336.

See DAMAGES, 26. EQUITY, 6. JUSTICES' COURTS, 4, 9, 10. PRACTICE, CRIMINAL, 8, 9.

JURY, SEPARATION OF.

See PRACTICE, CIVIL—TRIALS, 10.

JUSTICES' COURTS.

1. *Justices' courts — Forcible entry and detainer — Appeal — Transcripts — Must be filed, when, during term of Circuit Court.* — In an action of forcible entry and detainer, where a judgment is rendered before a justice during a term of the Circuit Court, the justice is not obliged to furnish appellant with a transcript unless the affidavit and recognizance are filed with him before the sixth day after the judgment (Gen. Stat. 1865, ch. 188, §§ 11, 12, 23), and the omission to file the transcript within the six days is fatal to the appeal. The appellate court has no jurisdiction of the subject-matter in such case, and the consent of parties can not give it.—Robinson v. Walker, 117.
2. *Session of court, judicial cognizance of.* — In appeals of this sort it need not appear in proof that the Circuit Court was in session at the date of the judgment before the justice. The Circuit Court could officially know from its own records when it was in session.—*Id.*
3. *Courts, justices'— Items of account must show the amount sued for.* — In an action before a justice of the peace, the account sued on and the specific items claimed, and not the amount named in the prayer for judgment, must be taken as showing the "debt or balance" sued for.—Stephenson v. Porter, 358.
4. *Replevin — Justice's court — Frame building — Jurisdiction.* — An action in replevin before a justice of the peace for the recovery of a "frame building" is not bad on its face for want of jurisdiction. Whether the building was attached to the realty and constituted a part of it, so as to be the subject of an action in ejectment, or was a mere personal chattel, was a point to be settled by the evidence.—Elliott v. Black, 372.
5. *Replevin — Dismissal — Suit on return bond—Damages—Justice's court.* — When the complainant in a replevin suit fails to prosecute the same to a successful issue, that failure constitutes a breach of the condition of his return bond, and warrants a suit upon it, although there may have been no judgment in the replevin suit either for damages or a return of the property; and this is true whether the suit originated before a justice or the Circuit Court.—*Id.*

JUISTICES' COURTS—(*Continued.*)

6. *Justices' courts — Transcripts — Executions — Returns touching summons — Execution returned within the time authorized by law, effect of — Collateral proceedings.*—In case of suit to set aside a sheriff's sale made under an execution issued in the Circuit Court upon a justice's transcript, the certificate of the justice appended thereto, that summons against defendant was returned "executed as the law directs," was sufficient evidence of proper summons, without the necessity of setting forth the same. Nor can the sale be impeached because the execution in the justice's court was returned unsatisfied sooner than the time authorized by law. For these irregularities the execution may be quashed in direct proceedings for that purpose, but not in collateral proceedings when the rights of third parties intervene.—Norton v. Quimby, 388.
7. *Justice's court — Statement in, must show what.*—A statement of facts constituting a cause of action in a justice's court is sufficient if it advise the opposite party of the nature of the claim, and be sufficiently specific to bar another action.—Iba v. Hann. and St. Jo. Railroad Co., 469.
8. *Justice's court — Suit for damages — Obstruction of drain.*—A suit before a justice simply to recover damages for obstructing plaintiff's drain, does not involve an investigation of title to real estate.—Williams v. Browning, 475.
9. *Executions—Garnishment—Justice's court—Jurisdiction—Judgment against garnishee before return day of writ.*—The statute limiting the jurisdiction of justices (Sess. Acts 1868, p. 59, § 1) has no application to garnishment proceedings. Under sections 27–40, Gen. Stat. 1865, the garnishee is authorized, without any resort to the justice at all, to deliver property or pay money sufficient to satisfy the execution, without regard to its amount; and the justice's jurisdiction as to the amount of his judgment is co-extensive with the authority given to the garnishee to pay over to the constable. In such case the justice may render judgment against the garnishee without waiting for the return day of the writ.—Davis v. Staples, 567.
10. *Execution—Justice's court—Garnishee entitled to injunction against plaintiff in execution, when.*—A garnishee in execution before a justice is not entitled to an injunction against the plaintiff simply on the ground that the amount seized exceeded the jurisdiction of the justice, or that judgment was entered against him before the return day of the writ. To entitle him to this remedy he must make a showing that it would be against conscience to execute the judgment complained of; that he has not been remiss in his own duties, and that he has been deprived of his right by some fraud or accident. —*Id.*

See DAMAGES, 26.

## K

KANSAS CITY COURT OF COMMON PLEAS.

See COURTS.

## L

LANDLORD AND TENANT.

1. *Lands and land titles — Leases — Fixtures, removal of, agreement concerning.*—Where a building is erected by one person on the land of another by

LANDLORD AND TENANT—(*Continued.*)

his permission, upon an agreement or understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel and the property of the person who erected it.—Goodman v. Hann. and St. Jo. R.R. Co., 33.

2. *Landlord and tenant—Injunction—Chattels, removal of.*—Where the landlord, before the expiration of the term, enjoins the tenant from removing the chattels or fixtures, the tenant will be allowed a reasonable time after the dissolution of the injunction within which to demand and remove the same.—*Id.*

3. *Forcible entry and detainer—Section 36, chap. 187, Gen. Stat. 1865, construction of.*—A. claimed title to certain land by virtue of the possession of B., his grantor, but never had possession himself. *Held*, that section 36, chap. 187, Gen. Stat. 1865, concerning suits for forcible entry and detainer, by heirs, devisees, grantees, etc., of persons dispossessed under the statute, was not intended to apply to such cases. The heirs, etc., have no greater rights than the ancestor, if living, or the vendor, if he had not sold, could have had. The defendant must still be found guilty of actual dispossession. The object of the statute was not to change the rights or liabilities of the parties, but, when they had accrued, to provide that they should not lapse by death or sale.—McCartney's Adm'r v. Alderson, 35.

4. *Forcible entry and detainer—Meaning of terms "disseizin" and "lawfully possessed."*—The statute concerning forcible entry and detainer (Gen. Stat. 1865, ch. 187) is a possessory action merely. The term "disseizin," as therein used, implies actual dispossession. The term "lawfully possessed" does not involve an inquiry into the lawfulness of the possession as regards title, but only in regard to the mode of obtaining it, and is equivalent to "peaceably possessed." In actions under this statute, proof of title in plaintiff, with payment of taxes and acts of ownership merely, is not evidence of peaceable possession.—*Id.*

5. *Forcible entry and detainer—Possession of a portion of premises, with title to the whole, effect of.*—The possession of a portion of the premises in dispute carries the possession of the whole, if the title covers the whole.—*Id.*

6. *Forcible entry and detainer—Landlord—Disseizin of tenant.*—The landlord has no such possession as will enable him to complain of a disseizin of his tenant.—*Id.*

7. *Justices' courts—Forcible entry and detainer—Appeal—Transcripts—Must be filed, when, during term of Circuit Court.*—In an action of forcible entry and detainer, where a judgment is rendered before a justice during a term of the Circuit Court, the justice is not obliged to furnish appellant with a transcript unless the affidavit and recognizance are filed with him before the sixth day after the judgment (Gen. Stat. 1865, ch. 188, §§ 11, 12, 23), and the omission to file the transcript within the six days is fatal to the appeal. The appellate court has no jurisdiction of the subject-matter in such case, and the consent of parties can not give it.—Robinson v. Walker, 117.

8. *Session of court, judicial cognizance of.*—In appeals of this sort it need not appear in proof that the Circuit Court was in session at the date of the judgment before the justice. The Circuit Court could officially know from its own records when it was in session.—*Id.*

9. *Forcible entry and detainer—Action by purchaser against lessee in possession, what question submitted to the jury—Construction of statute.*—In an

LANDLORD AND TENANT—(*Continued.*)
action of forcible entry and detainer by the purchaser of certain property against a lessee in possession, it is proper to submit to the jury by an instruction, the question whether plaintiff, by proper conveyances, had succeeded to the right and remedies of the lessor. (Gen. Stat. 1865, p. 733, §§ 36, 40: Wagn. Stat. 648, §§ 36, 40.)—Gillette v. Mathews, 307.

10. *Forcible entry and detainer — Peaceable possession — Limitation of three years — Does not apply, when.*—The three-years limitation to proceedings for forcible entry and detainer (Gen. Stat. 1865, ch. 187, § 27; Wagn. Stat. 646, § 27) does not apply to cases where defendant was lessee, and held his possession under plaintiff, as lessor, or under the plaintiff's grantor, or under the prior owner.—

11. *Forcible entry and detainer — Collusion between defendant and tenant — Presence of plaintiff, testimony touching, competency of.*—When the petition in an action of forcible entry and detainer charged that defendant obtained possession through collusion with a tenant of plaintiff, proof negativing the averment of collusion is competent, and its competency is in no way affected by the fact of plaintiff's presence or absence when defendant got possession. —Smith v. Meyers, 434.

12. *Forcible entry and detainer — Question of title not proper in action of.*— The question of title is in no way involved in an action of forcible entry and detainer.—*Id.*

LANDS AND LAND TITLES.

1. *Lands and land titles — Leases — Fixtures, removal of, agreement concerning.*—Where a building is erected by one person on the land of another by his permission, upon an agreement or understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel and the property of the person who erected it.—Goodman v. Hann. and St. Jo. R.R. Co., 33.

2. *Lands and land titles — Tax collector's deed—Title of State of Missouri— Of former purchaser — What title conveyed.*— A tax collector's deed which purports to convey to the purchaser "all the right, title, and estate" of the State of Missouri in and to the premises, and does not purport to convey anything more, can pass no title to the purchaser.—Einstein v. Gay, 62.

3. *Lands and land titles — Confirmation — Assignment — Act of July 4, 1836.* —The board of commissioners, under the act of Congress of July 4, 1836, confirmed a certain lot "to A. or his legal representatives." *Held*, that the party claiming must do so, if not in his own name, at least in his own person, and produce evidence of his title as such legal representative. This being done, the title will inure to his own benefit; and it is not necessary that the confirmation should be made to him by name. (Connoyer et al. v. Washington University, 36 Mo. 481.)—Connoyer v. LaBeaume's Heirs, 139.

4. *Equity — Devises of lands; of money in lieu of — Election — Conveyance of land pending election — What title conveyed.*— When the testator devises the interest of certain heirs in a specified tract of land to other members of his family, and also devises to said heirs certain moneys as their full share and just proportion of the land, the equity doctrine of election applies; the appearance of the heirs in court and their renunciation of the land is also an election; and the attempted conveyance by them and its acceptance by the purchaser during suit in partition of the land, and while the election is being

LANDS AND LAND TITLES—(*Continued.*

made, especially when the purchaser acted as a sort of attorney for them, and drew and swore them to their answer in that suit, is a gross and naked fraud attempted to be perpetrated upon the other heirs of the testator, a contempt of the court in which the proceedings are pending, and possesses no validity whatever.—O'Reilly v. Nicholson, 160.

5. *Lis pendens—Deed void.*—The deed of a party *pendente lite* is void, and even an innocent purchaser would take nothing by his deed, and could convey nothing; and a purchaser *pendente lite* is bound by the decree that may be made against the person from whom he derives title.—*Id.*

6. *Terms "fee," "fee simple," "fee simple absolute," meaning of.*—In modern estates the several terms "fee," "fee simple," and "fee simple absolute" are substantially synonymous.—Jecko, Trustee of Hume, v. Taussig, 117.

7. *Conveyances—Fee simple—To married woman—Authority of to convey, with remainder over to heirs, etc.*—Certain land was conveyed to a married woman and her trustee, "to be sold and conveyed in fee, mortgaged, or rented," as she might, in writing, direct. The deed further provided that, in case of her death before her husband's, the estate might vest in her surviving children. *Held*, that her authority to convey was absolute and unlimited, and that the latter provision did not affect her power of alienation during the life of her husband: *semble*, that equity will enforce specific performance of a contract to purchase an estate so conveyed upon tender of deed to the purchaser.—*Id.*

8. *Lands and land titles—Possession must be adverse.*—Possession, to give title, must not only be continued, open, and notorious, but adverse.—Thomas v. Babb, 384.

9. *Lands and land titles—Occupation by mistake or ignorance, effect of—Disseizin.*—If defendant in an ejectment suit erected his fence accidentally upon plaintiff's land, through mistake or ignorance of the correct line separating the tracts, and without intending to claim beyond the true line, then the line of occupation thus taken, and the possession that followed it, did not work a disseizin.—*Id.*

10. *Ejectment—Proof of sheriff's deed proper under general issue.*—In a suit in ejectment, the deed of a sheriff conveying the property in controversy to defendant, under a judicial sale, is admissible in evidence as well under the general issue, as showing a defect of title in the plaintiff, as under special averments.—Brown v. Brown, 412.

11. *Ejectment—Title from common source—Title by defendant at sale under judgment against plaintiff—Prima facie case for plaintiff—Rebutted, how.*—It is an established principle that in ejectment suits, where both litigants claim title through the same third party, it is sufficient for the plaintiff to deduce title from the common source, and when defendant claims through purchase at sheriff's sale of the property, under judgment of another against plaintiff, he thereby admits the validity of plaintiff's title up to the date of the sale, and concedes a *prima facie* case to plaintiff; and the burden of proof devolves upon him to overcome it by showing that plaintiff's title has vested in himself, or come to a determination in some other way.—*Id.*

12. *Lands and land titles—Boundaries fixed—Monuments must prevail over linear measurements.*—A., being owner of 120 feet on Third street, in the city of St. Louis, deeded to B. 60 feet thereof, described as adjoining on the north

LANDS AND LAND TITLES—(*Continued.*)

his grantors. B. afterward conveyed to C. the northern 30 feet of this property, and the remainder to D., being 30 feet to each. In a controversy between C. and D. as to location, *held*, that were there any monuments fixing the southern boundary of A.'s original land, they must prevail over the linear measurements. Otherwise D. must yield to C., and, unless barred by adverse possession, will be entitled to recover a similar tract from his southern neighbor.—Kellogg v. Mullen, 571.

13. *Land claim under Spanish permission of settlement conveys only the equitable title, but equitable title sufficient for the confirmation.*—A claimant of land under a Spanish permission of settlement has merely an equitable title. The legal title would not pass to the heir till the claim was confirmed by the United States; but the equitable title, for the purposes of confirmation, would be sufficient. The confirmation would inure equally to the claimant, be his title legal or equitable.—Carpenter v. Rannels, 584.

14. *Lands and land titles—Claims before board of land commissioners by B., as assignee of A.—Confirmation to A. or his legal representatives—Effect of on claim of B.*—Where the records of the proceedings before the board of United States land commissioners for the adjustment of claims, in 1811, showed that B., as assignee of A., claimed certain land, under the act of Congress of March 2, 1805 (U. S. Stat. 324), and produced to the board evidence of his derivative title, the legal effect of a judgment of the board confirming the land "to A. or his legal representatives" was to confirm the title to B., although his name was omitted in the form of the confirmation.—*Id.*

15. *Recorder of land titles, headings of—Records of U. S. land commissioner superior to.*—The titles for headings prefixed by the recorder of land titles to his records of papers in a case must yield if they come in conflict with the records of the United States land commissioners. Such title or heading of papers, recorded by the recorder, neither fixed their character nor determined the fact as to who the claimant was.—*Id.*

See CONTRACTS, 11. CONVEYANCES, 6, 8. EJECTMENT. FRAUDS, STATUTE OF, 1. JUSTICES' COURTS, 8. LANDLORD AND TENANT, 12.

LEASE.

See FRAUDS, STATUTE OF, 3. LANDLORD AND TENANT, 1. LANDS AND LAND TITLES, 1. MECHANICS' LIEN, 1.

LEGISLATURE.

See BANKS AND BANKING, 1, 2, 3. CONSTITUTION.

LEVY.

See PRACTICE, CIVIL—JUDGMENTS, 2.

LIEN.

See BOATS AND VESSELS, 1, 2, 4. MECHANICS' LIEN. REVENUE, 2.

LIMITATIONS.

1. *Limitations—Administrator's bond—Construction of statute.*—An action on an administrator's bond has ten years to run from the time of the accruing of the action. (R. C. 1855, ch. 103, art. II, § 2.) Section 9, ch. 191, Gen. Stat. 1865, amending section 3, art. II, of the practice act of 1849 (Sess. Acts 1849, p. 74), was intended to enlarge the range of the ten years' limitation, as applied to personal actions, so as to include actions upon written instruments, where the payments contemplated by the obligation were to arise indirectly

LIMITATIONS—(*Continued.*)

and collaterally, as well as directly. Section 48, art. I, ch. 2, R. C. 1855 (Gen. Stat. 1865, ch. 120, § 49), limiting actions against the sureties of administrators to seven years, is restrictive in its character, and was framed upon the evident hypothesis that the general limitation act provided a longer time in which such suits could be brought.—Martin v. Knapp, 48.

2. *Mechanics' lien, action on—Continuous delivery—Statutory limitation.*—In suit on a mechanics' lien, the petition alleged that between certain dates plaintiffs delivered divers material to defendants. The first delivery was more than six months anterior to the filing of the lien. *Held,* that a fair construction of this averment was that the sales and deliveries were continuous between the dates mentioned, and that the whole account was brought within the statutory limit of six months. (Gen. Stat. 1865, ch. 195, § 5.)—Cantwell v. Massman, 103.

3. *Limitations—Special tax bills, statute applies to.*—A special tax bill issued more than five years prior to commencement of suit for its collection, is barred by the statute of limitations. (Gen. Stat. 1865, ch. 191, § 10.) In such suit the city is the substantial plaintiff; and as that section in terms applies to demands in favor of the State, by implication it also applies to demands of a city corporation created by the State, in the absence of any provision to the contrary.—City of St. Louis, to use of Dippelheuer, v. Newman, 138.

4. *Partnership — Part payment by one partner — Statute of limitations.*—Part payment of a firm debt by one partner, after dissolution, within five years before suit brought, will take the debt out of the operation of the statute of limitations as to the other partner; but *semble,* that the rule would not apply in case of part payment made after the statute had run and the debt had been barred.—McClurg v. Howard, 365.

5. *Mechanics' lien — Limitation of actions.*—The law limiting the time for commencement of suit after filing the account under mechanics' lien, which was in force at the time of beginning such suit, must prevail over such law of limitation which prevailed at the time of filing the account. (Hauser v. Hoffman, 32 Mo. 334, affirmed.)—Forcht v. Short, 377.

6. *Bills and notes — Contribution—Suit for, by co-surety—Statute of limitations.*—In case of suit for contribution by a surety on a bill of exchange against his co-surety, the statute of limitations commences running against his claim from and after the day on which he paid the original judgment or the bill, and not from the time when the bill was dated; and his claim is not operated on by the limitation of ten years, but by that of five.—Singleton v. Townsend, 379.

See BILLS AND NOTES, 11. LANDLORD AND TENANT, 10. LANDS AND LAND TITLES, 8, 9. PRACTICE, CIVIL—PLEADING, 5. SHERIFF, 3.

LIS PENDENS.

See CONVEYANCES, 3. MANDAMUS, 2.

## M

MANDAMUS.

1. *Practice, Civil—Appeal to District Court — Bond — Mandamus — Writ of error.*—The Cape Girardeau Court of Common Pleas granted an appeal to

MANDAMUS—(*Continued.*)

the Second District Court, with the proviso that no transcript should be made out until the filing of the bond. *Held*, that such proviso was unwarranted; but the clerk, acting under the direction of the court, properly refused to issue the transcript in default of bond, and *mandamus* would not lie against him to compel its issue. The proper remedy of appellant in such case would be writ of error.—State ex rel. Benne v. Englemann, 27.

2. *Practice, civil — Lis pendens — Plea in abatement — Board of education — Board de facto.*— Proof of the pendency of a former suit between the same parties, founded on the same cause of action, is not a good ground for abatement unless the subsequent suit, on actual examination, proves to be vexatious and unnecessary. And where execution on a judgment in favor of the treasurer of a board of public schools, against a county treasurer, was stayed by appeal to a District Court, proceedings in *mandamus* to enforce speedy payment of the amount sued for were not vexatious or unnecessary, so as to furnish good ground for a plea in abatement. In the latter proceedings, if persons constitute a board *de facto*, the legality of their election is not a subject of inquiry. Being a board *de facto*, the county treasurer may safely pay over money to them.—State ex rel. Craig v. Dougherty, 294.
3. *Mandamus — Suit on bond — Board of education.*— The fact that the treasurer of a board of public schools has a remedy on the official bond of a county easurer for non-payment of money, will not prevent his proceeding against im by *mandamus.—Id.*
4. *Board of education — County treasurer — Mandamus — Amount to be paid over not inquired into.*— In *mandamus* by the treasurer of a board of public schools against a county treasurer for non-payment of money owing to the board, this court will not investigate the question of the amount to be paid, or order the payment of a specific sum; but will require him to pay over the actual balance of collections in his hands, whatever it may be.—*Id.*

See COURTS, COUNTY, 8. JURISDICTION, 3, 5. ROADS, COUNTY, 2.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MECHANICS' LIEN.

1. *Mechanics' lien — Leasehold estate does not extend to boilers or engines.*— Sections 2 and 4 of the act concerning mechanics' liens (Gen. Stat. 1865, ch. 195) extended the lien to a building erected by a tenant upon leased premises with power of removal, but not to engines and boilers erected by him thereon. The term "improvement," as used in that act, is synonymous with "building," and does not include engines and boilers.—Collins v. Mott, 100.
2. *Mechanics' lien—Meaning to be attached to decision in Koenig v. Mueller.*— The decision in Koenig v. Mueller, 39 Mo. 165, was not intended to assert that no improvements which could be removed from the leased premises are subjects of a mechanics' lien, but only that when the building belongs to the landlord, in selling the tenant's term, his movable improvements should not pass. —*Id.*
3. *Mechanics' lien, action on — Continuous delivery — Statutory limitation.*— In suit on a mechanics' lien, the petition alleged that between certain dates plaintiffs delivered divers material to defendants. The first delivery was more than six months anterior to the filing of the lien. *Held*, that a fair

MECHANICS' LIEN—(*Continued.*)

construction of this averment was that the sales and deliveries were continuous between the dates mentioned, and that the whole account was brought within the statutory limit of six months. (Gen. Stat. 1865, ch. 195, § 5.)—Cantwell v. Massman, 103.

4. *Courts, inferior and local — Mechanics' liens — Situation of property, averment of petition as to.*— The Kansas City Court of Common Pleas was an inferior and local court. Under the act of March 2, 1859 (Sess. Acts 1858-9, p. 353, § 5), it had "concurrent jurisdiction with the Circuit Court to enforce mechanics' or other liens in Kaw township." In a suit in that court on a mechanics' lien sought to be enforced against certain property in Kaw township, *held*, that the petition, not averring that the property was situated in that township, was fatally defective. Where the judgments of local courts and courts of inferior jurisdiction are called in question, the record should show affirmatively all the facts necessary to give them jurisdiction, both of the subject-matter of the suit and of the parties to it.—Schell v. Leland, 289.
5. *Mechanics' liens — Four months expiring Sunday, lien must be filed Saturday.*— Under the mechanics' lien law (Wagn. Stat. 909, § 5), when the four months after the indebtedness accrued expired on Sunday, the lien is insufficient unless filed on the Saturday preceding. The act touching construction of statutes (Wagn. Stat. 888, § 6) must be construed in its restrictive sense, and in the case supposed both the first and last day must be excluded. —Patrick v. Faulke, 312.
6. *Mechanics' lien — Limitation of actions.*— The law limiting the time for commencement of suit after filing the account under mechanics' lien, which was in force at the time of beginning such suit, must prevail over such law of limitation which prevailed at the time of filing the account. (Hauser v. Hoffman, 32 Mo. 334, affirmed.)—Forcht v. Short, 377.
7. *Mechanics' lien—Statement of the balance due the plaintiff, without detailed statement of credits, etc., insufficient.* — The term "account," as used in the mechanics' lien law, means a detailed statement of mutual demands in the matter of debit and credit, arising out of a contract, or some fiduciary relation between parties; and a statement filed in a mechanics' lien suit which does not show even the aggregate of the different items, or the aggregate of the credits on account of the work, but simply sets down, in a round sum, what the plaintiff's claim as the balance due them, is insufficient.—McWilliams v. Allan, 573.

MERCHANTS.

1. *Criminal law — Dealing as merchant — Definition of merchant.*— One who manufactures and supplies goods to the previous orders of his customers alone, although he keeps on hand, but not for sale, the materials from which the manufactured articles are produced, is not a merchant within the meaning of the statute (Wagn. Stat. 937, § 1). (State v. West, 34 Mo. 424.)—State v. Richeson, 575.
2. *Criminal law—Information for dealing as merchant without license—What dealings constitute a merchant—Burden of proof on defendant, to show what.* —In an action by the State against one engaged in the manufacture of white lead, for exercising the trade and business of a "merchant without license," the State would make out a *prima facie* case by showing that defendant, after receiving orders from his customers, filled them the same and succeeding

MERCHANTS—(*Continued.*)

days. The natural inference would be that he kept the articles on hand; and to rebut this inference it was not sufficient to show that he *might* have manufactured the lead after the orders were received, but he should have shown that he did so manufacture it.—*Id.*

MISTAKE.

See CONVEYANCES, 9, 10, 11. ERRORS, CLERICAL. LANDS AND LAND TITLES, 9. SHERIFF, 5.

MORTGAGES AND DEEDS OF TRUST.

1. *Mortgages—Mortgagor may become purchaser, when.*—Where the mortgagor is privy to the sale of the mortgaged property, assents to the acquisition of title by the mortgagee, and afterwards concurs in it, and there is no suspicion of fraudulent practice, the mortgagee may become the purchaser at his own sale; and the mere fact that at the time of the purchase he stipulates with the mortgagor for a re-acquisition of the property on repayment of the purchase money, will not, in the absence of proof showing an intention to that effect, remit the parties to their original relation of mortgagor and mortgagee. In such case the mortgagor could not, after slumbering in his rights for five years, enforce such stipulation in an action of ejectment.—Medsker v. Swaney, 273.

2. *Fraud—Mortgage sale—Verbal agreement by mortgagor to reconvey—Effect of, as fraud in fact.*—Although in case of purchase by the mortgagee of mortgaged property, a mere verbal agreement by him to reconvey, on being reimbursed his advance, as a contract, would be invalid, as being within the statute of frauds; yet a refusal to convey within a year, or within a reasonable time, if that was the understanding, on being tendered his money, may be, in the absence of a satisfactory explanation, sufficient evidence of fraud in fact to set aside the conveyance and admit the mortgagor to his right of redemption.—*Id.*

3. *Bills and notes secured by deed of trust—Priority of payment, although all become due on default of payment on one note.*—Although by the express terms of a deed of trust the notes secured all became due upon the first default in payment, it did not follow that they stood upon an equality in the distribution of the fund. Without an express agreement to that effect, the priority of claims in such case will not be impaired or interfered with. (Mitchell v. Ladew, 36 Mo. 526; Mason v. Barnard, *id.* 384, affirmed.)—Hurck v. Erskine, 484.

See CONTRACTS, 4. TRUSTS, 1.

## N

NEGLIGENCE.

See DAMAGES.

NEW TRIALS.

See COURTS, ST. LOUIS CIRCUIT.

NON-SUIT.

See PRACTICE, CIVIL, 1.

NOTICE.

See PRACTICE, CIVIL, 2, 3.

# O

OFFICERS.

1. *Sheriff — Bond, liability on — Section 30, chapter 63, R. C. 1855.*—The obligor in a bond of indemnity given under section 30, ch. 63, R. C. 1855, is liable thereon to the sheriff as well as to persons claiming the property.—Stewart v. Thomas, Adm'r of Ball, 42.
2. *Sheriff—Execution—Indemnity bond, suit on, by sheriff—Notice to plaintiff in execution.*—Where judgment is rendered against a sheriff on his bond, for an unlawful levy, and he afterward sues plaintiff in the execution on his bond of indemnity (R. C. 1855, ch. 63, § 30), the latter may make any defense which could have been made in the original suit against the sheriff. Notice, with opportunity of making the defense, should have been given the plaintiff in the execution at the time of the first suit. Otherwise, the judgment is but *prima facie* evidence of his liability on the bond.—*Id.*
3. *Quo warranto — County sheriff — Vacancy — Title to office.*—A vacancy in the office of sheriff, such as a County Court is authorized to fill, implies a state of things where no one has any title to the office. Such vacancy does not exist when, on *quo warranto*, judgment of ouster against the incumbent of the office was obtained on the ground that relator had a superior title.—State ex rel. McCune v. Ralls County Court, 58.
4. State *ex rel.* McCune v. The County Court of Ralls County, *ante*, p. 58, affirmed.—State ex rel. Rice v. Ralls County Court, 61.
5. *Distress warrant — Execution — Sale and deed under.*— Where the State auditor issued a distress warrant (R. C. 1855, p. 1542, § 3 *et seq.*; Wagn. Stat. 1335, § 18 *et seq.*) against a county sheriff for default in payment of public money, and on failure to collect the amount thereof, levy was made on the land of the securities on his official bond, the authority of the sheriff to convey the property to the purchaser will not be presumed from the mere recitals in the conveyance itself. The execution of the bond, the default of defendant, the issue of the warrant, the failure to collect the amount from the principal obligor, must be shown *aliunde*. In the absence of a provision similar to that touching the title vested in the grantee in case of tax sales (Wagn. Stat. 1204, §§ 111–12), such recitals in a sheriff's deed, under a distress warrant, are not even *prima facie* evidence of the regularity of the previous proceedings.—Cook v. Hacklemann, 317.
6. *Executions — Judicial sales—Executions under distress warrant.*— The act touching judicial sales (R. C. 1855, p. 748, § 56; Wagn. Stat. 612, § 54) has no application to a sale under an auditor's distress warrant.—*Id.*
7. *Mandamus — Election of judge to Legislature — Pay of a judge while member of Legislature.*—Under section 11, article 4, Constitution of Missouri, where one holding the office of judge of a Circuit Court qualified and took his seat in the Legislature, he elected to vacate the office of judge, and would not be entitled to his salary as judge afterwards. He should, however, receive pay after the time of his election to the Legislature till he qualified as member.—Owens v. Draper, 355.

See AGENCY, 3. CIRCUIT ATTORNEYS. COURTS, COUNTY, 4. ELECTIONS, 4. MANDAMUS, 5. PRACTICE, CRIMINAL, 2, 3. QUO WARRANTO, 1, 2, 3. REVENUE, 4. ST. LOUIS, CITY OF, 1, 2, 3. SHERIFF.

OFF-SET.

See CORPORATIONS, 7.

# P

PARTITION.

1. *Partition—Wife of coparcener can not be party.*—It is unnecessary to make the wife of a person interested in the partition of lands a party to a proceeding for partition therein. (Lee v. Lindell, 22 Mo. 202.) If the land be divided in specie, her inchoate right attaches at once to her husband's share. If it be sold, she has no claim to any portion of the proceeds.—Hinds v. Stevens, 209.
2. *Equity—Proceedings in partition.*—A proceeding in chancery may be had for the partition of an equitable estate. (Welch v. Anderson, 28 Mo. 293; Reinhardt v. Wendeck, 40 Mo. 577.)—Reed v. Robertson, 580.
3. *Equity—Partition of equitable estate—What averments sufficient.*—In a suit for the partition of equitable interests in real property, an averment of the petition that each party held an undivided half of the equitable estate, is sufficient, without any allegation that they held jointly or as tenants in common.—*Id.*

PARTNERSHIP.

1. *Partnership—Weight of testimony not passed on by Supreme Court.*—In suit to recover a moiety of partnership assets, this court will not pass on the question of the weight of testimony.—Gillespie v. Early, 159.
2. *Partnership—Part payment by one partner—Statute of limitations.*—Part payment of a firm debt by one partner, after dissolution, within five years before suit brought, will take the debt out of the operation of the statute of limitations as to the other partner; but *semble*, that the rule would not apply in case of part payment made after the statute had run and the debt had been barred.—McClurg v. Howard, 365.

See BILLS AND NOTES, 16, 17. REPLEVIN, 1, 2, 3.

PART PERFORMANCE.

See FRAUDS, STATUTE OF, 1.

PRACTICE, CIVIL.

1. *Practice, civil—Case involving law and equity—Voluntary non-suit, effect of.*—Where a suit involving legal and equitable proceedings was laid before a jury, and plaintiff voluntarily took a non-suit of the case without submitting the equity branch to the court at all, this court will not relieve him.—Kirby v. Bruns, 234.
2. *Practice, civil—Orders of publication, facts authorizing—Statement of in petition or affidavit—Issue of in vacation, when allowable.*—Under the statute relating to orders of publication (Wagn. Stat. 1008 § 13), when the facts authorizing publication were neither stated in plaintiffs' petition nor in an affidavit filed at the commencement of the suit, no order was allowable in vacation. Section 15 of the same chapter does not authorize an order of publication in vacation at all, but intends that it shall be made by the Court at the regular return term. And an order of publication rendered in vacation, on a sheriff's return that defendant was "not found," is a nullity.—Schell v. Leland, 289.
3. *Practice, civil—Defective service, when waived and when not.*—An appearance and defense will be considered as a waiver of an imperfect return or defective service. But the appearance of a defendant for the especial purpose

PRACTICE, CIVIL—(*Continued.*)
of moving the court to arrest a judgment constitutes no waiver of any valid objection which he has to defective process and service.—*Id.*

4. *Practice, civil — Lis pendens — Plea in abatement — Board of education — Board de facto.*—Proof of the pendency of a former suit between the same parties, founded on the same cause of action, is not a good ground for abatement unless subsequent suit, on actual examination, proves to be vexatious and unnecessary. And where execution on a judgment in favor of the treasurer of a board of public schools, against a county treasurer, was stayed by appeal to a District Court, proceedings in *mandamus* to enforce speedy payment of the amount sued for were not vexatious or unnecessary, so as to furnish good ground for a plea in abatement. In the latter proceedings, if persons constitute a board *de facto*, the legality of their election is not a subject of inquiry. Being a board *de facto*, the county treasurer may safely pay over money to them.—State ex rel. Craig v. Dougherty, 294.

5. *Bills and notes, action on — Averments as to title — Pre-existing indebtedness — Manner of acquiring ownership — Allegation as to, immaterial.* — In a suit on a promissory note, the petition alleged that the payer transferred the note to plaintiff "for a valuable consideration to the payee in hand paid." *Held*, that proof showing the note to have been sold plaintiff in satisfaction of a pre-existing debt, sufficiently sustained the averment of the petition in regard to title. Under such averment the only material fact to be established was that of ownership; and the manner of acquiring it, whether by purchase with cash or other property, or by a discharge of pre-existing indebtedness, is of no importance.—Wilson v. Murphy, 409.

6. *Bills and notes, suits on — Pendency of attachment suit wherein defendant was garnishee, no defense, when.*— In a suit on a note by the assignee of the payee against the makers, the pendency of an attachment suit against the payee, wherein the makers were sued as garnishees, would constitute no defense if the assignment was in fact made before the garnishment. The pendency of the attachment might be pleaded in bar, provided the defense alleged that the note sued on was, *e. g.*, in fact still the property of the attachment debtor, and not simply charged by the creditor as his property. The garnishee may protect himself from liability to double payment by conforming to the requirements of the statute. (Wagn. Stat. 668, §§ 25-6.) —*Id.*

7. *Practice, civil — Motion to dismiss — Failure to except, effect of.*—When no exceptions are taken to the action of the Circuit Court in overruling a motion to dismiss for want of due service of summons, its action in that behalf is not open to review in the Supreme Court.—Williams v. Browning, 475.

See COURT, ST. LOUIS CIRCUIT, 1. FRAUDS, STATUTE OF, 3. JUSTICES' COURTS.

PRACTICE, CIVIL—ACTIONS.

1. *Practice, civil — Actions — Replevin — Testimony as to value of property — Dismissal of suit, when allowed.*— Plaintiff in a replevin suit will not be allowed to dismiss his suit before the hearing of testimony as to the value of the property delivered to plaintiff. (Berghoff v. Heckwolf, 26 Mo. 512.)—Ranney, Adm'r of Walls, v. Thomas, 111.

2. *Practice, civil — Actions — Replevin — Administrator, judgment against, how levied.*—Where the plaintiff brings suit in replevin as administrator, and

PRACTICE, CIVIL—ACTIONS—(*Continued.*)
judgment is rendered against him, it should be entered against him in his official character, to be levied out of the testator or intestate.—*Id.*

3. *Replevin — Dismissal — Suit on return bond — Damages — Justice's court.* —When the complainant in a replevin suit fails to prosecute the same to a successful issue, that failure constitutes a breach of the condition of his return bond, and warrants a suit upon it, although there may have been no judgment in the replevin suit either for damages or a return of the property; and this is true whether the suit originated before a justice or the Circuit Court.——Elliott v. Black, 372.

4. *Replevin — Justice's court — Frame building — Jurisdiction.*—An action in replevin before a justice of the peace for the recovery of a "frame building" is not bad on its face for want of jurisdiction. Whether the building was attached to the realty and constituted a part of it, so as to be the subject of an action in ejectment, or was a mere personal chattel, was a point to be settled by the evidence.—*Id.*

See EJECTMENT, 5. INSURANCE, 1. LANDLORD AND TENANT. PRACTICE, CIVIL, 5, 6.

PRACTICE, CIVIL—APPEAL.

1. *Practice, civil — Evidence — Verdict — Instructions.*—When there is any evidence to sustain a verdict, the Supreme Court will not interfere.—McPheeters Hann. and St. Jo. R.R. Co., 22.

2. *Practice, civil — Appeal to District Court — Bond — Mandamus — Writ of error.* — The Cape Girardeau Court of Common Pleas granted an appeal to the Second District Court, with the proviso that no transcript should be made out until the filing of the bond. *Held*, that such proviso was unwarranted; but the clerk, acting under the direction of the court, properly refused to issue the transcript in default of bond, and *mandamus* would not lie against him to compel its issue. The proper remedy of appellant in such case would be writ of error.—State ex rel. Benne v. Englemann, 27.

3. *Practice, civil — Assignment of errors — Judgment affirmed, when.*—When plaintiff in error neglects to file an assignment of errors, and no cause for the omission is shown, the judgment of the court below will be affirmed.—Myers v. Evens, 32.

4. *Practice, civil — Supreme Court — Judgment affirmed, when.* — Where respondent presents to the Supreme Court a transcript of the record, and it appears therefrom that the appeal was taken more than thirty days before the commencement of the term, and no steps have been taken to prosecute the appeal, the judgment of the lower court will, on motion, be affirmed. — State v. Macklin, 33.

5. *Practice, civil — Supreme Court — Failure to prosecute appeal — Judgment affirmed, when.*— Where respondent presents in the Supreme Court a perfect transcript of the record, and it appears therefrom that the appeal was taken more than thirty days before the commencement of the term, and that no steps have been taken to prosecute the appeal, the judgment of the lower court will, on motion, be affirmed. (See Gen. Stat. 1865, ch. 135, §§ 29, 46, and p. 890, § 17.) — International Mutual Live Stock Ins. Co. v. Lang, 41.

6. *Certiorari will not lie, except to review judicial proceedings.*— The action of a County Court in subscribing to railroad stock and issuing bonds for pay-

PRACTICE, CIVIL—APPEAL—(*Continued.*)

ment thereof is a discretionary and not a judicial proceeding, and therefore not the subject of review by writ of *certiorari* from the Supreme Court.—*In re* Saline Co. Subscription, 52.

7. *Partnership—Weight of testimony not passed on by Supreme Court.*—In suit to recover a moiety of partnership assets, this court will not pass on the question of the weight of testimony.—Gillespie v. Early, 159.

8. *Practice, civil—Instructions—Evidence not weighed by Supreme Court.*—In trials at law, this court will not attempt to weigh evidence. But when there is a complete failure of evidence, this court will intervene to prevent injustice being done.—Routsong v. Pacific R.R., 236.

9. *Practice, civil—Bill of exceptions should state that it contains all the evidence.*—A bill of exceptions is defective in not stating that it contains all the evidence which was given in the cause.—*Id.*

10. *Practice, civil—Testimony—General exceptions to, not sufficient.*—General exceptions to all testimony will not be re-examined in the Supreme Court.—Gillette v. Mathews, 307.

11. *Practice, civil—Bill of exceptions must show that all the evidence is included.*—A bill of exceptions need not, in words, state that it contains all the evidence, if, from the whole record, such is plainly the fact.—Merchants' Bank v. Ward's Adm'r, 310.

12. *Practice, civil—Supreme Court—Exceptions must be saved below.*—When no exceptions are taken to the rulings of the court below, they will not be considered on appeal to this court.—Jameson v. The State and Webster County, 332.

13. *Questions of fact for the jury.*—Questions whether witnesses swear falsely, or what credit is to be attached to evidence, or how far it is contradictory, are solely for the jury in trials at law, and will not be considered in the Supreme Court.—Bonnell v. U. S. Express Co., 422.

14. *Appeals without merit—Damages.*—When appeals are without merit, ten per cent. damages may be awarded.—*Id.*

15. *Damages.*—On appeals without merit, ten per cent. damages may be awarded.—Kelley v. U. S. Express Co., 428.

16. *Practice, civil—Supreme Court—Appeal dismissed, when—Statement and points not filed.*—When appellant files no statement of the case, or points intended to be insisted upon in the argument, the appeal will be dismissed.—Ford v. Winters, 448.

17. *Supreme Court—Damages—Ten per cent. allowed, when.*—When the record plainly shows that the appeal was taken for delay, and is destitute of merit, the judgment will be affirmed, with ten per cent. damages.—Banister v. Henn, 567.

18. *Practice, civil—Supreme Court—Objection made for first time comes too late.*—An objection to the sufficiency of a petition, made in the Supreme Court for the first time, comes too late.—Reed v. Robertson, 580.

See COURTS, COUNTY, 10, 11. ELECTIONS, 3. JUSTICES' COURTS, 1, 2. PRACTICE, CIVIL—JUDGMENTS, 1. PLEADINGS, 4. TRIALS, 6.

PRACTICE, CIVIL—JUDGMENT.

1. *Practice, civil—Judgment—Exceptions, when to be taken.*—When no exception was taken to the acts or rulings of court prior to judgment, it is too

PRACTICE, CIVIL—JUDGMENT—(*Continued.*)
late to initiate objections to such acts or rulings afterward.—Ranney, Adm'r of Walls, v. Thomas, 111.

2. *Practice, civil—Actions—Replevin—Administrator, judgment against, how levied.*—Where plaintiff brings suit in replevin as administrator, and judgment is rendered against him, it should be entered against him in his official character, to be levied out of the testator or intestate.—*Id.*

3 *Practice, civil—Decree, interlocutory—Power of court to set aside.*—Suit was brought to set aside the forfeiture of certain leases, and for an account of the rents, profits, etc. The court issued a decree entitling plaintiff to redeem the premises on payment to defendant of an amount to be ascertained by a referee, and ordered an account to be taken for that purpose. *Held*, that the decree was not final, but interlocutory, and subject to the control of the court so long as the case properly remained upon its docket awaiting final action, and that it had power, at a subsequent term, to make an order vacating the decree; and, further, that affidavits showing the decree to have been issued without notice, trial, or consent, made a case calling for the exercise of that power.—Dieckhart v. Rutgers, 132.

4. *Equity—Relief—Jurisdiction—Judgments, when not impeachable collaterally.*—A judgment, though informal, even to the extent of granting a relief not contemplated by the petition, when parties are before the court and the relief is within its jurisdiction, is not a void proceeding, and can not be impeached collaterally.—O'Reilly v. Nicholson, 160.

5. *Clerical errors—Judgments nunc pro tunc—When may be entered.*—Where the clerk of a court fails to enter judgment, or enters up the wrong judgment, there is no doubt about the existence of power in the court to correct the matter, and order the proper entries to be made at any time. The court may always at subsequent terms set right mere forms in its judgments, or correct misprisions of its clerks, or any mere clerical errors, so as to conform the record to the truth. But when the court has omitted to make an order which it might or ought to have made, it can not at a subsequent term be made *nunc pro tunc*. In all cases in which an entry *nunc pro tunc* is made, the record should show the facts which authorize the entry.—Gibson v. Chouteau's Heirs.

6. *Administrator, bond of—Suit on—Allegation—Breaches—Verdict, arrest of.*—In a suit on an administrator's bond, where the petitioner sets out several distinct breaches, a verdict for an entire and gross sum is erroneous, and furnishes a sufficient ground for arrest of judgment, on motion.—State ex rel. Collins v. Dulle, 269.

7. *Judgment—Infants—Guardian ad litem—Void and voidable judgment.* A judgment against an infant, who appears by attorney and not by guardian, although irregular and reversible on error, is merely voidable, and not absolutely void, so as to enable defendant to successfully resist a subsequent action upon it.—Townsend, Adm'r, v. Cox, 401.

See EQUITY, 6, 12. PRACTICE, CIVIL, 1

PRACTICE, CIVIL—PARTIES.

1. *Administrator de bonis non—Must sue for the assets—Creditors can not sue for them.*—When an administrator dies, the admintrator *de bonis non* is the proper person to sue for the assets belonging to the estate, and a creditor of the estate will not be permitted to sue for his entire debt on the bond of the

PRACTICE, CIVIL—PARTIES—(*Continued.*)
deceased administrator. Such a course would lead to confusion, and destroy and practically annul the statutory provision concerning priorities and classifications.—State ex rel. Collins v. Dulle, 269.

2. *Damages—Suit for, under statute—Father and mother as plaintiffs, divorce of.*—In suit for damages under section 2, p. 520, Wagn. Stat., the father and mother of the deceased child may join as plaintiffs, although divorced prior to the accruement of the cause of action.—Buel v. St. Louis Transfer Co., 562.

PRACTICE, CIVIL—PLEADINGS.

1. *Damages—Railroad companies—Cow, killing of—Petition—Allegation of negligence, sufficiency of.*—In a suit for damages against a railroad company for killing a cow, the allegation that the act was done carelessly and negligently was sufficient, and showed a good cause of action.—McPheeters v. Hann. and St. Jo. R.R. Co., 22.

2. *Practice, civil—Pleadings—Statute, how pleaded—Objections must be made in court below.*—It is only necessary for a party wishing to avail himself of a statute to state facts which bring his case within its provisions (Wagn. Stat. 1020, § 41), although according to the rules of good pleading he ought to refer to it. But all the circumstances essential to support the action must be alleged, or in substance appear on the face of the petition. If the matter were defectively stated therein, objection should be raised in the court below; otherwise it can not be entertained.—Kennayde v. Pacific R.R. Co., 255.

3. *Practice, civil—Pleadings—Objections to petition—What can not be made by motion in arrest.*—An objection to a petition for misjoinder of counts, or a union of several causes in one count, if not made by demurrer or motion to strike out, will be deemed to have been waived (Wagn. Stat. 1015, § 10), and can not be raised by motion in arrest of judgment. (Hoagland v. Hann. and St. Jo. R.R. Co., 39 Mo. 451, overruled.)—House v. Lowell, 381.

4. *Practice, civil—Failure to file replication—Objection on account of, not considered unless raised in lower court.*—When the answer sets up new matter, and no replication is filed, defendant should move for judgment on the pleadings; and if no objection is taken or point raised as to any insufficiency or defectiveness in the court below, they will not afterward be considered in the Supreme Court.—Smith v. City of St. Joseph, 449.

5. *Practice, civil—Petition—Amendment, when relates back—Limitations.*—Where an amendment to a petition in a suit for damages (Wagn. Stat. 519, § 2) sets up no new matter or claim, but is merely a variation of the allegations affecting a demand already in issue—as where, by the original petition, a party was assigned to the wrong side of the cause, and the mistake was corrected—it relates to the commencement of the suit, and the running of the statute is arrested at that point.—Buel v. St. Louis Transfer Co., 562.

SEE BILLS AND NOTES, 16. CORPORATIONS, 7. EQUITY, 20. INSURANCE, 1. PRACTICE, CIVIL, 5, 6.

PRACTICE, CIVIL—TRIALS.

1. *Practice, civil—Evidence—Verdict—Instructions.*—When there is any evidence to sustain a verdict, the Supreme Court will not interfere.—McPheeters v. Hann. and St. Jo. R.R. Co., 22.

2. *Practice, civil—Instructions offered out of time, properly refused.*—An instruction offered by counsel, after the commencement of the argument to the jury, is properly refused by the court.—*Id.*

PRACTICE, CIVIL—TRIALS—(*Continued.*)

3. *Practice, civil — Instructions — Term "gross," when should be used in.*— An instruction using the term "gross" should not be given without some explanation of its import, especially without some testimony upon which to found it.—Mueller v. Putnam Fire Insurance Co., 84.

4. *Practice, civil — Trial — Instructions neither given nor refused, effect of.*— An instruction was asked by defendant, at the conclusion of plaintiff's case, to the effect that plaintiff was not entitled to recover on the proofs. The court took no action on the instruction, but the trial proceeded, and defendant put in his evidence. *Held*, that the instruction was practically refused.—Vastine, Public Adm'r, v. Wilding, 89.

5. *Practice, civil—Trial—Instructions not warranted by evidence, not given.*— It is misdirection and wrong practice to give instructions, no matter how correct they may be abstractly, if the evidence in the particular case does not warrant or justify them.—Franz v. Hilterbrand, 121.

6. *Practice, civil — Trial — Instructions — Evidence.*— In trials at law, the Supreme Court will not weigh conflicting evidence.—Meyer v. Pacific R.R. Co., 137.

7. *Practice, civil — Trial — Instructions — Singling out specific acts, etc., not permissible.*— The practice of singling out in instructions specific acts, and asking the court to say, as a matter of law, that if these acts were established there could be no recovery, is not permissible.—*Id.*

8. *New trial — Newly-discovered evidence.*— The granting of a new trial on the ground of newly-discovered evidence is a matter resting in the sound discretion of the judge trying the case.—Merchants' and Manufacturers' Insurance Co. v. Curran, 142.

9. *Practice, civil — Instructions — Evidence — Account, note given in payment of—Receipt—Jury.*—In a suit on an account, the mere acceptance by the plaintiff of notes given by defendant for the debt, and the giving of a receipt for the amount due, without further proof, does not constitute such evidence of payment as to warrant the court in sending the case to the jury.—Doebling v. Loos, 150.

10. *Practice, civil—Jury, separation of, will not invalidate a verdict, when.*— It is the well-settled doctrine in this State that the separation of a jury in a criminal case will not invalidate a verdict or furnish grounds for a new trial, there being no ground to suspect that they have been tampered with or that they have acted improperly.—State v. Brannon, 329.

11. *Practice, civil—Instructions directing a verdict on a certain state of facts, must embrace all.*—An instruction which hypothecates a state of facts, and upon their existence directs a verdict, is improper unless all the facts are hypothecated which are necessary to sustain a verdict.—Thomas v. Babb, 384.

12. *Practice, civil—Instructions, requisites of.*—Each instruction must be correct in itself; all must be consistent with each other; and the whole taken together must present but one doctrine.—*Id.*

13. *Practice, civil—Weight of evidence, verdict of jury considered as to.*—In trials at law, juries are the proper judges as to the weight of evidence, and their verdicts on that issue are conclusive on the Supreme Court.—Bradford v. Rudolph, 426.

14. *Question of credibility for jury.*—The jury are the sole judges of the credibility of witnesses.—Kelly v. United States Express Co., 428.

PRACTICE, CIVIL—TRIALS—(*Continued.*)

15. *Practice, civil—Verdict—Weight of evidence.*—The rule that an appellate court should not disturb a verdict when there is evidence to sustain it, will not prevent the reversal of a cause when the verdict of the jury must of necessity have been for a smaller sum than the one in the record.—Fury v. Merriman, 500.

16. *Damages—Instruction—Phrase "undue carelessness."*—In an action for damages, the phrase "undue carelessness," in an instruction concerning negligence, is calculated to confuse and mislead the jury, and is proper ground for a reversal.—Buel v. St. Louis Transfer Co., 562.

See BILLS AND NOTES, 2, 16. EVIDENCE, 3. LANDLORD AND TENANT, 9. PRACTICE, CIVIL—APPEALS, 13.

PRACTICE, CRIMINAL.

1. *Practice, criminal—Oral instructions, parties can not consent to.*—The statute (Gen. Stat. 1865, ch. 213, § 30) does not authorize the judge of a Criminal Court, even at the request or by consent of parties, to give oral instructions as to matters of law. It would be incompetent for the prisoner himself to consent to such waiver of the statutory requirement, and, *a fortiori*, his counsel can have no such right.—State v. Cooper, 64.

2. *Practice, criminal—Costs, exemption from payment of—Law relating to, in United States.*—The only feature of the English law relating to the exemption of poor persons from liability to pay costs, adopted in the criminal practice of the United States, is the obligation of the court to assign counsel for such accused persons as are unable to employ any.—State ex rel. Miller v. Dailey, 153.

3. *Practice, criminal—Appeal—Transcript—Clerk must make out transcript, although costs are unpaid.*—The duty (under Gen. Stat. 1865, ch. 215, § 16) of sending up a proper transcript, upon *supersedeas* in a criminal prosecution, is imperative, and is personal to the clerk, without the application of the accused; and for the performance of this duty the law imposes upon no one the obligation of advancing the fees.—*Id.*

4. *Crimes and punishments—Passing forged checks—Evidence—Handwriting Comparison.*—In an action for passing a counterfeit or forged bank check, where the signature and indorsement were positively proved, and no other papers were introduced in evidence for the purpose of admitting testimony by comparison, it was competent to submit the whole paper to the jury, with or without the aid of experts, for them to form their own conclusion as to whether the whole instrument thereon was produced by one and the same hand.—State v. Scott, 302.

5. *Practice, criminal—Trial—Re-trial at same term where no verdict.*—A prisoner may be again put on trial at the same term where the first trial has not resulted in a verdict.—*Id.*

*Practice, criminal—Convictions—Sentences—Terms of imprisonment—Construction of statute.*—On the same day a prisoner was convicted and sentenced under two indictments. The sentences were pronounced after the verdicts in both cases had been rendered. The terms of imprisonment were, respectively, three and two years, but the day when they were to begin was not specified. *Held*, that the statute (Wagn. Stat. 513, § 9), without the aid of such specification, makes the second term commence on the expiration of the first; and *habeas corpus* for his discharge at the end of the first term, on the

PRACTICE, CRIMINAL—(*Continued.*)

ground that the second and shorter term had already elapsed, will be denied. —*Ex parte* Turner, 331.

7. *Crimes and punishments — Indictment — Peddlers' goods, etc., not the produce of this State — Burden of proof.*—In an indictment brought under the act concerning peddlers (Wagn. Stat. 979, § 1), the proof not being peculiarly within the knowledge of defendant, it devolves upon the State, in order to insure conviction, to prove that the goods, wares, and merchandise sold were not the growth, produce, or manufacture of this State. In such case full and plenary proof is not required, but sufficient to make out a *prima facie* case will be necessary.—State v. Hirsch, 429.

8. *Practice, criminal — Trials — Jurisdiction, question of, always open for examination.*—Questions going to the jurisdiction of the court over the cause of action, or subject-matter of the complaint, are in order at any stage of the proceedings in a case.—State v. Lawrence, 492.

9. *Practice, criminal — Jurisdiction — Court of Criminal Correction — Executions issued by a justice for purpose of extortion.*—Forfeiture of office, and a disqualification to hold office and vote, were designed by the Legislature as part of the "punishment" to be visited on one convicted of illegally issuing an execution for purposes of extortion, under color of office as justice of the peace. (Gen. Stat. 1865, ch. 204, §§ 16, 19.) But the St. Louis Court of Criminal Correction, prior to the amendment of 1869 (Sess. Acts 1869, p. 196, § 13), had no jurisdiction over misdemeanors where the punishment following conviction went beyond a fine and imprisonment, and therefore had no jurisdiction of such a complaint.—*Id.*

10. *Husband and wife — Neglect to "maintain or provide" — Words sufficient under statute.*—Under the act of 1867, p. 112, section 1, a complaint which charged that the defendant abandoned his wife, and failed to maintain or provide for her, is sufficient. The words "maintain and provide," as used in the statute, mean simply a provision of maintenance, the neglect of which, after abandonment, completes the offense defined.—State v. Larger, 510.

11. *Misdemeanors, trial of — Jury — Waiver.*—In misdemeanor cases, the statute does not require any express waiver of a jury in order to authorize a trial by the court. If defendant was not willing to be tried by the court, he should have objected at the time; and in such cases, as it is not required that the submission shall be entered on the minutes, or in any manner become a matter of record, it is not to be presumed from the silence of the record that the court proceeded irregularly and without authority.—*Id.*

12. *Husband and wife—Action charging husband with refusal to maintain wife, etc.*—In an information by the wife charging her husband with abandoning her without good cause, and refusing to maintain and provide for her, the question put to a witness, whether defendant had not rented of him a house which plaintiff refused to occupy, was proper, and should have been allowed. —State v. White, 512

See MERCHANTS.

PRACTICE — SUPREME COURT.

See CIRCUIT ATTORNEYS, 1. PRACTICE, CIVIL — APPEAL. QUO WARRANTO, 1, 2, 3

PRESBYTERIAN CHURCH.

1. *Quo warranto — Lindenwood College — General Assembly — "Declaration and Testimony" signers.* — The charter of Lindenwood Female College provided that vacancies in its board of trustees should be filled by the presbytery which was "connected with the General Assembly of the Presbyterian Church in the United States of America, usually styled 'Old School.'" By resolution passed in May, 1866, the General Assembly resolved that if any presbytery should enroll one or more signers of a paper known as "The Declaration and Testimony," that presbytery should, *ipso facto*, be dissolved, and that its ministers and elders adhering to the General Assembly were authorized to take charge of the presbyterial records, to retain the same, and to exercise all the authority and functions of the original presbytery until the next meeting of the General Assembly. In pursuance of this resolution, the Presbytery of St. Louis was, by one of its members, pronounced dissolved, in September, 1866, for enrolling a signer of that paper. *Held*, that a presbytery so dissolved had no power to appoint trustees of Lindenwood College; and that, on proceedings in *quo warranto* against such trustees, they were properly ousted in favor of others, appointed by a body composed of members of that presbytery adhering to the General Assembly.—State ex rel. Watson v. Farris, 183.
2. *Ecclesiastical law — Old School Presbyterian General Assembly, powers of.* — The General Assembly of the Presbyterian Church, commonly known as "Old School," possesses the unlimited control of superintending the concerns of the whole church, and of suppressing schismatical contentions and disputations. It combines within itself all the branches which constitute the elements of a complete government, namely, executive, legislative, and judicial; and acts upon all subjects coming before it according as they belong to each or either of these departments. It possesses extensive original and appellate jurisdiction, and whether a case is regularly or irregularly before it is a subject for it to determine for itself; and no civil court can revise, modify, or impair its action in a matter of merely ecclesiastical concern.—*Id.*

PROCESS.

See ATTACHMENT, 1. PRACTICE, CIVIL, 2, 3. SHERIFF, 1, 2.

PROHIBITION, WRIT OF.

See COURTS, COUNTY, 8. JURISDICTION, 5.

PUBLICATION, ORDER OF.

See ATTACHMENT, 1. PRACTICE, CIVIL, 2.

## Q.

QUO WARRANTO.

1. *Quo warranto — Proceedings in, by attorney-general, do not settle title of claimant to office.* — In case of information by the attorney-general in behalf of the State, against one holding an office, the private rights of a third party claiming it are not determined. When a private person wishes to have his right to an office adjudicated, the information should be prosecuted at his relation and proceeded upon as in *quo warranto*. (Wagn. Stat. 1133, § 2.)—Hunter v. Chandler, 452.
2. *Quo warranto should not be brought before Supreme Court, except, etc.* — Except in peculiar cases, the Supreme Court will refuse to allow an informa-

QUO WARRANTO—(*Continued.*)

tion to be filed before it to inquire into the title of a private person to an office. Parties should, in general, resort in such cases to the Circuit Court.—*Id.*

3. *Quo warranto commenced prior to resignation, prosecuted afterward—Suit for fees after expiration of term, etc.*—The resignation of an officer or expiration of his term will not prevent an information to test his title, if commenced prior thereto, from being afterward prosecuted to final judgment; and *semble*, that suit for money had and received during his term will lie against him, although commenced after resignation or expiration of term; provided, that plaintiff had been once in possession, and had been unlawfully ousted. But when the title is in doubt, proceedings in *quo warranto* must be first had to settle that issue.—*Id.*

See COURTS, COUNTY, 2. ELECTIONS, 4. OFFICERS, 3. PRESBYTERIAN CHURCH.

## R

RAILROADS.

1. *Corporations — Railroads — Subscriptions to, vote upon — Definite amount of stock must be voted for.*—The law authorizing the Saline County Court to subscribe stock in the Lexington and St. Louis Railroad Company, expressly provided that the subscription should not be made unless a majority of the tax-payers should vote for it, "specifying the amount." The order of the County Court submitting the question to the people, called on them to vote for or against an amount "not exceeding $70,000," leaving the precise amount undetermined. The entry in the records of the County Court, subsequent to the vote, declared that the election resulted "in favor of levying a tax of $70,000, to subscribe the same to the capital stock of the Lexington and Jt. Louis Railroad." In *mandamus* against the court to compel the issue of the bonds, and levy of tax for their payment, *held*, that such entry was not a conclusive finding of the court of the fact that the tax-payers voted to subscribe the specific sum of $70,000, but that, under a fair interpretation of the record, it showed merely that the question submitted had received a majority of the votes. The bonds of a county can be made valid only by a substantial compliance with the law that authorizes their issue; and the failure of voters to specify their amount, in the case at bar, rendered bonds issued in pursuance of such vote invalid.—State ex rel. Lexington and St. Louis R.R. Co. v. Jaline ounty OOourt, 242.

2. *Corporations — Railroads — Agreement to locate depot in consideration of donation of lands, void when.*—A. agreed with the Pacific Railroad Company to deed it a certain lot of ground for purposes of speculation, in consideration that the company would locate a freight and passenger depot on his land. There was no evidence that the land was to be used for the general business of locating, constructing, managing, and using the road. *Held*, that although in one sense the company was a private corporation, yet its chartered privileges were granted, in part, to subserve great public interests; that such an agreement might be superinduced by prospects of mere gain, and thus the general welfare and good of the public might be sacrificed to subserve mere

RAILROADS—(*Continued.*)

private interest; that for this reason such an agreement was void against public policy.—Pacific R.R. Co. v. Seeley, 212.

3. *Corporations — Railroads — Power to hold land, governed by its charter.*— The charter of the Pacific Railroad Company gave it power to acquire a strip of land not exceeding one hundred feet wide for a right of way, and to hold sufficient ground for the erection and maintenance of depots, landing places, etc. *Held*, that the corporation had no power to acquire land for purposes of speculation. A corporation can purchase and hold land only for such purposes as are authorized by its charter.—*Id.*

4. *Damages — Railroads — Accident policies — General accident tickets — Vexatious delay.*— An engineer killed on a railroad locomotive had previously purchased a ticket issued by the Railway Passengers' Assurance Company, which, by its terms, insured against death "caused by accident while traveling by public or private conveyance provided for the transportation of passengers." Suit being brought by his legal representatives on the policy, the proof showed that defendant was selling two classes of tickets, one known as the "travelers' risk," the other as the "general accident," the latter being sold for the highest price; that deceased purchased the latter; that at the time of the purchase defendant's agent knew him to be an engineer, and had no instructions not to sell to railroad employees. *Held*, that deceased was insured against all accidents, without regard to the capacity in which he was acting; that the ticket was intended to cover the accident by which he met his death; and that defendant was liable. *Held, also*, that it was the duty of defendant to pay upon notification of the death of deceased, and, on its refusal to comply, interest was thenceforth payable.—Brown v. Railway Passengers' Assurance Co., 221.

5. *Ejectment — Railroad lands — Congressional grant—Filing map of land in county records.*— In case of suit in ejectment by the Hannibal and St. Joseph Railroad Company, under the act of Congress of June 10, 1852, and the Missouri statute of September 20, 1852 (R.R. Laws, p. 117), where no question was made as to the location of the road, nor was it questioned that the land sued for was included within the grant by Congress, nor was it urged that the land had been sold by the United States, or that any right of pre-emption had attached to it, nor was it disputed that plaintiff's proof made out a *prima facie* case—the mere non-recording in a given county of the map of lands taken by the railroad company in that county, as directed by the act of September 20, would not be fatal to plaintiff's recovery.—Hann. and St. Jo. R.R. Co. v. Moore, 443.

See DAMAGES, 1, 2, 4, 15, 16, 17, 18, 20. EMINENT DOMAIN, 1, 2.

RECORD, UNITED STATES.

See LANDS AND LAND TITLES, 15.

REPLEVIN.

1. *Replevin—Execution against copartnership effects, under judgment against insolvent partner — Replevin by solvent partner against sheriff's judgment, for value of property or return thereof.*—Defendant in a replevin suit claimed a lien on the replevied property as constable, by virtue of a levy upon it under a judgment against plaintiff's co-partner. The property was a portion of the partnership assets. In such a case the constable's interest in the property was

REPLEVIN—(*Continued.*)

limited to the execution debtor's interest in the partnership effects, and plaintiff was entitled to show that the interest of the latter was merely nominal and of no value. In these suits, when plaintiff gives bond and takes the property, the jury should find a verdict for defendant for the value of his interest in the property, nominal damages and costs, or for a return of the property, at the election of defendant. (Wagn. Stat. 1026, § 12.) But plaintiff might, by paying off the amount of the lien, retain the property, and defendant would have no alternative but to accept the money if seasonably tendered.—Gilham v. Kerone, 489.

2. *Replevin—Profits and losses shown is no proof of ownership, etc.*—A. may have been the owner of, and entitled to the possession of, certain goods, notwithstanding that B. was interested in the profits of the sales. And in replevin for the goods against a sheriff, the jury were improperly instructed to find for defendant if, at the time of seizure, B. was owner of the property, or interested in the profits to be realized from the sale thereof.—Rapp v. Vogel, 524.

3. *Partnership property seized by creditor of one partner—Partners in interest ascertained.*—The interest of a partner is subject to seizure by his private creditors, and the measure of his interest can be determined in the trial of a replevin suit for the property.—*Id.*

See JUSTICES' COURTS, 5. PRACTICE, CIVIL—ACTIONS, 1, 2, 3, 4.

RES ADJUDICATA.

1. *Courts, County, allowance of claim by—In what case not res adjudicata.*—The action of a County Court in allowing a claim of the county collector against the county, through a mistake of fact, is not *res adjudicata*, so as to bar a suit by the county to recover back the amount allowed. In such case the judges of the court acted merely as the fiscal agents of the county, and their mistake might be inquired into and corrected, as well as those of an individual acting in his own behalf.—County of Marion v. Phillips, 75.

REVENUE.

1. *Land and land titles—Tax collector's deed—Title of State of Missouri—Of former purchaser—What title conveyed.*—A tax collector's deed which purports to convey to the purchaser "all the right, title, and estate" of the State of Missouri in and to the premises, and does not purport to convey anything more, can pass no title to the purchaser.—Einstein v. Gay, 62.

2. *Revenue—Real estate sold subsequent to first Monday in September—Taxes on, paid by whom—Lien of tax.*—State and county taxes constitute a lien on real estate from and after the first Monday in September, and the then owner will be liable to a subsequent purchaser for them, on his covenant of warranty, even though the sale is prior to the assessment. (Blossom v. Van Court, 34 Mo. 390; Gen. Stat. 1865, ch. 12, § 12.)—McLaren v. Sheble, 130.

3. *Equity—Taxes, lands sold for, redemption of—Ignorantia legis.*—Within the time allowed to redeem certain lands sold for taxes, the owner, having been in the military service, made tender, under the act of March 12, 1867, of the amount of the tax, with ten per cent. interest. This being refused, he filed his petition to enjoin the delivery to the purchaser of his tax deed. The court, after the proceeding had remained in court till after the time for redemption had expired, decided the act relied on to be unconstitutional and the claim of the owner to be invalid, but allowed him to add to his tender the amount required by the statute to redeem, although the time of redemption

REVENUE—(*Continued.*)

had lapsed, and on payment of costs made the injunction perpetual. *Held*, that the rule *ignorantia legis*, etc., did not apply to such case, especially as the delay beyond the time of redemption was caused in part by the action of the court, and that equity in the premises properly relieved against such mistake of law.—Harney v. Charles, 157.

4. *Revenue — School taxes — Delinquent land list — Warrant for, made out on the county treasury.*—Under the act of 1868, concerning schools (Wagn. Stat. 1246–7, §§ 18–20), the justices of a County Court are bound to issue to the township clerk, on demand, for the use of the schools, a warrant on the county treasury for the amount of the delinquent list of land taxes due the sub-school districts, without waiting until they are collected and paid into the county treasury.—Wallendorf v. The County Court of Cole County, 228.

5. State *ex rel.* Wallendorf v. Cole County Court, *ante*, p. 228, affirmed.—State ex rel. Sexton v. County Court of Cass County, 230.

See LIMITATIONS, 3.

RIGHT OF WAY.

See DAMAGES, 19.

ROADS, COUNTY.

1. *County roads — Proceedings to obtain change of road must contain what.*—Persons wishing for a change in a county road can only apply for it, under the statute (Wagn. Stat. 1229, §§ 56–58), by a petition showing a wish to cultivate their land, by proof of notice, and procurement of written consent from the person upon whom they would turn the road. If they wish a new road, under sections 49 and 53, p. 1228, the width of the road should be fixed, and the "intermediate points" on the road should be specified, and the damage should be assessed by a jury before the proceedings were determined; and the assessment of damages in favor of one whose property was taken for the road, after the final action of the court, is altogether irregular, and creates no debt.—Wilson v. Berkstresser, 283.

2. *Mandamus—Jurisdiction of Circuit Courts by, over County Courts—Roads —Assessment of damages.*—In the matter of paying damages assessed for the right of way on a public road, Circuit Courts have jurisdiction over the County Court by *mandamus*, and in a proper case may issue the writ; and a writ of prohibition will not issue to prevent its erroneous exercise.—*Id.*

3. *County roads, petition for — Signatures of householders, proof concerning— Joint assessments.*—A petition for a new county road need not show on its face that twelve of its signers were householders, although this fact must be proved to the satisfaction of the court before any action can be taken upon the petition. But although this character of the signers does not appear in the records of the court, an order of court establishing the road will raise the presumption that it was proved, unless the contrary appears; and where the damages were assessed in favor of the petitioners, jointly, they will be presumed to have owned the land taken jointly, and not severally.—Snoddy v. Pettis County, 361.

4. *County roads—Orders for opening, under section 52, p. 1228, Wagn. Stat.— Defects in.*—An order for opening a county road, under section 52 of the act touching roads (Wagn. Stat. 1228), wherein it was adjudged "that the petitioners for said road pay the assessed damages and costs, and that the road be

ROADS, COUNTY—(*Continued.*)

opened," was defective in not specifying the width of the road, in attempting to render judgment for damages against the petitioners, and in making an order for opening the road before the petitioners had paid "the amount of such damages into the county treasury."—*Id.*

## S

ST. LOUIS, CITY OF.

1. *St. Louis, city of—Deposit of carcasses—Mayor.*—The city of St. Louis is not liable to the owner of property for damages caused by the deposit of dead mules on his premises, under an arangement with the mayor. His action in such case was outside of his official duties, and could not bind the city.—Hilsdorf v. City of St. Louis, 94.
2. *St. Louis, city of—Removal of carcasses—Power of city over acts of contractors.*—The city of St. Louis had no power to control the action of persons employed under Art. IX of ordinance 4894, for the removal of dead animals, under their contract; and having no such power, they could not be responsible for such action.—*Id.*
3. *St. Louis, city of—Removal of carcasses—Responsibility of owner for.*—The fact that the city of St. Louis has made a contract for the removal of dead animals does not exonerate the owner from any responsibility in regard to them when that contract can not be or is not complied with; nor can the obligation he is under to let the contractor have the carcass, if he does not himself appropriate it within twelve hours, if the contractor shall come for it, be construed to discharge all responsibility on his part.—*Id.*

ST. LOUIS COUNTY COURT.

See COURTS, COUNTY, 4.

SALES.

1. *Sales—Delivery, constructive and actual—Lien of vendor.*—Where nothing is said at the time of purchase of goods about payment, the law presumes that the sale is for cash; and in such case payment and delivery are immediate and concurrent acts, and the vendor has the indisputable right to refuse to deliver without payment; and although the counting out and separation would amount to a constructive delivery, so as to vest title in the vendee and make the property at his risk, still actual delivery and change of possession could not be coerced until payment is made. There may be a delivery which will pass title, but while possession is retained the lien will not be destroyed. (Southwestern F. & C. P. Co. v. Stanard, 44 Mo. 71, affirmed.)—Southwestern Freight and Cotton Press Co. v. Plant, 517.
2. *Sales—Sub-vendee has no greater right than the vendee.*—A sub-vendee, or a third party to whom an order is given for the delivery of goods, has no rights greater than, or superior to, the person from whom he derives title. If the vendor had the possession or the right of detention for the unpaid purchase money, he would still retain that right notwithstanding the assignment or transfer.—*Id.*

See ADMINISTRATION, 4, 5, 6. BANKS AND BANKING, 3. CONTRACTS, 1, 4, 5. DISTRESS WARRANTS, 1, 2. EQUITY, 4, 5. SHERIFF, 4, 5.

SCHOOLS.

See BANKS AND BANKING. CONSTITUTION, 1, 2, 3. MANDAMUS, 2, 3, 4. REVENUE, 4.

SEIZIN.

See LANDLORD AND TENANT, 4, 6

SHERIFF.

1. *Sheriff's return—Amendment, when granted.*—An amendment of a sheriff's return, made after judgment, can not be permitted when it has the effect of rendering the judgment erroneous; but an amendment in aid of the judgment, in furtherance of justice, is allowable.—Stewart v. Stringer, 113.

2. *Sheriff's return — Amendment and vacation of, when permissible.*—Where an amendment to a sheriff's return, touching service of summons on defendant, was allowed and vacated at the same term of court, and long after judgment and sale thereunder, and the making and vacation of the amendment left the *status* of the parties unchanged, the court had power to order the vacation.—*Id.*

3. *Sheriff — Commissioner required to give bond — Failure to give — Liability of on bond — Statute of limitations.*— An ex-county sheriff was appointed by the Circuit Court commissioner to loan out, for the benefit of a widow, certain money belonging to her which he had held for her in his capacity as sheriff; and, as such commissioner, was directed to give bond, which he failed to do. In suit on his bond as sheriff, by the widow's heirs, for the money, *held*, that he was appointed commissioner on certain conditions which were not performed, and hence, that the appointment never took place; and that he became liable for the amount on his bond as sheriff; further, that his liability commenced immediately on the death of the widow, and was not barred till the lapse of three years thereafter.—State, to use of Graham, v. Peacock, Adm'r, 263.

4. *Sales—Sheriff's, at Circuit Court-house door, during session, are valid, etc.*—Judgment was obtained in the Common Pleas Court of Cass county, while in session at Pleasant Hill, and execution was issued therefrom. But the sale by the sheriff was made at the court-house door of the Circuit Court, at Harrisonville, the county seat, during a term of the Circuit Court, and not at the place where the Common Pleas Court was held, nor during a session thereof. *Held*, that, under the statute concerning judicial sales (Wagn. Stat. 609, § 42), such sale was valid.—Mers v. Bell, 333.

5. *Sheriff, sale by — Mistake as to date of, in return and recitals of deed.*— Land was advertised by the sheriff to be sold, and was in fact sold, on the 5th day of January. But the sheriff's return, and his recitals in the deed to the purchaser, declared the sale to have been on the "4th" of January. *Held*, 1st, that the mistake in the return as to the day of sale was not material, for the reason that it was not necessary to the validity of the purchase that the sheriff should make a correct return, or any return at all; and 2d, that the mistake as to the exact day of sale, occurring in the deed, was also immaterial, provided that the deed on its face was according to law, showing a sale at an authorized day during term of court.—Buchanan v. Tracy, 437.

See AGENCY, 3. DISTRESS WARRANT, 1. EJECTMENT, 4. EQUITY, 11. OFFICERS, 1, 2, 3, 5. REPLEVIN, 1.

SLAVES.

See HUSBAND AND WIFE, 6.

SPECIFIC PERFORMANCE.

See CONTRACTS, 1, 2, 5.

STATUTE, CONSTRUCTION OF

See ADMINISTRATION, 3. ATTACHMENT, 1, 3. BANKS AND BANKING, 1, 2, 3. BILLS AND NOTES, 16. BONDS, MUNICIPAL, 1, 2, 3. CONSTITUTION. COURTS, COUNTY, 3, 7, 9. DAMAGES, 10, 11, 24, 25. DISTRESS WARRANT, 1, 2. ELECTIONS, 1, 2, 3, 4. EXECUTIONS, 1, 6. HUSBAND AND WIFE, 3, 4. INFANTS, 2. INSURANCE, 6. JUSTICES' COURTS, 9. LANDLORD AND TENANT, 3, 4, 9, 10. LIMITATIONS, 1. MECHANICS' LIENS, 1, 4, 5, 7. OFFICERS, 1, 2. PRACTICE, CIVIL, 2. PRACTICE, CIVIL—PARTIES, 2. PRACTICE, CIVIL—PLEADINGS, 2, 4, 5. PRACTICE, CRIMINAL, 1, 6, 7, 10. RAILROADS, 1, 4. ROADS, COUNTY, 1, 4. TRUSTS, 1.

STOCKHOLDER.

See BANKS AND BANKING, 4. CORPORATIONS, 7.

STREETS.

See DAMAGES, 22, 23.

SUNDAY.

1. *Mechanics' liens—Four months expiring Sunday, lien must be filed Saturday.*—Under the mechanics' lien law (Wagn. Stat. 909, § 5), when the four months after the indebtedness accrued expired on Sunday, the lien is insufficient unless filed on the Saturday preceding. The act touching construction of statutes (Wagn. Stat. 888, § 6) must be construed in its restrictive sense, and, in the case supposed, both the first and last day must be excluded. —Patrick v. Faulke, 312.

SURETIES.

1. *Bills and notes — Parties — Co-sureties.*—Parties to bills and notes who intend to become co-sureties should so agree, or should all be drawers merely; or the payee and indorser should also be drawers. —McCune v. Belt, 174.
2. *Bills and notes—Co-sureties—Equity—Indemnity of one inures to the benefit of all.*—It is a settled principle of equity that if one of several co-sureties subsequently takes a security from the principal for his own indemnity, it inures to the benefit of all the sureties, so far as they are co-sureties. But so far as he has a security for individual claims which he has against the same person, he is entitled to hold it.—*Id.*
3. *Bills and notes — Contribution — Suit for, by co-surety—Statute of limitations.*—In case of suit for contribution by a surety on a bill of exchange against his co-surety, the statute of limitations commences running against his claim from and after the day on which he paid the original judgment on the bill, and not from the time when the bill was dated; and his claim is not operated on by the limitation of ten years, but by that of five.—Singleton v. Townsend, 374.

See BILLS AND NOTES, 6, 17. DISTRESS WARRANT, 1.

## T

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See REVENUE.
TAX TITLES.
See LANDS AND LAND TITLES, 1
TIME, COMPUTATION OF.
See SUNDAY.
TOWNS.
See DAMAGES, 2. COURTS, COUNTY, 1, 2, 3.
TRADE-MARKS.
1. *Trade-marks, injunction against use of—What imitation will justify, etc.* —To justify an injunction against a defendant from the use of a certain brand as an alleged counterfeit or imitation of that of plaintiff, it should at least appear that the resemblance between the two brands was sufficiently close to raise the probability of mistake on the part of the public, or design and purpose to mislead and deceive on the part of the defendant.—McCartney v. Garnhart, 593
TRANSCRIPT.
See JUSTICES' COURTS, 1. PRACTICE, CIVIL—APPEAL, 2. PRACTICE, CRIMINAL, 3.
TRESPASS.
See DAMAGES. EQUITY, 16, 17, 18.
TRUSTS.
1. *Trusts—Trustee's sale—Purchaser, auctioneer not agent for.*—When, at an auction sale under a deed of trust, the trustee acts as his own auctioneer, he can not bind the purchaser by a memorandum of the sale made by himself, so as to hold him liable, within the meaning of the statute of frauds (Wagn. Stat. 656, § 5). Although acting as auctioneer, he is a party to the sale, with natural interest and bias adverse to the purchaser; and the circumstance that he has no beneficial interest in the subject of the sale settles nothing as to his bias.—Tull v. David, 444.
See ADMINISTRATION, 4, 5. EJECTMENT, 5. MORTGAGES AND DEEDS OF TRUST.

## V

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